IN THE

Supreme Court of the United States

October Term, 1978
No. 78-276

ROLAND LERNER and PARKVIEW NURSING HOME,
Appellants,

-against-

CHARLES J. HYNES, Deputy Attorney General of the State of New York,
Respondent.

FAR ROCKAWAY NURSING HOME and LASZLO SZANTO,
Appellants,

-against-

CHARLES J. HYNES, Deputy Attorney General of the State of New York,
Respondent.

JURISDICTIONAL STATEMENT

ON APPEAL FROM COURT OF APPEALS OF NEW YORK STATE

GEORGE S. MEISSNER
Attorney for Appellants
16 Court Street
Brooklyn, N.Y. 11241
(212) 596-2596

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

CASES CITED

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No.

ROLAND LERNER ~~and PARKVIEW NURSING HOME~~,
Appellants,

-against-

CHARLES J. HYNES, Deputy Attorney General of the State of New York,
Respondent.

FAR ROCKAWAY NURSING HOME and LASZLO SZANTO,
Appellants,

-against-

CHARLES J. HYNES, Deputy Attorney General of the State of New York,
Respondent.

JURISDICTIONAL STATEMENT

ON APPEAL FROM COURT OF APPEALS OF NEW YORK STATE

JURISDICTIONAL STATEMENT PURSUANT TO RULE 15 OF SUPREME COURT RULES.

1. (a) Reference to Official Report of Opinions.

Appealed from: Matter of Far Rockaway Nursing Home, et al., v. Charles J. Hynes, as Deputy Attorney General of the State of New York, 44 NY 2d 383 (1978).

Matter of Charles J. Hynes, as Deputy Attorney General for Health, Social Services and Nursing Homes v. Roland Lerner, 44 NY 2d 329 (1978).

(b) Grounds upon which jurisdiction is Grounded:

(i) Appeal is taken on the ground that Section 2305 of the New York State Civil Practice Law and Regulations and Section 610.25 of the New York State Criminal Procedure Law are unconstitutionally vague in violation of Appellants due process rights and because said statutes are unconstitutional as they authorize search and seizure on less than probable cause.

(ii) Date of Judgment: The decision in both matters appealed from is dated May 4, 1978. The Order entered on or about said date. As regards the *Hynes v. Lerner* decision a motion for reargument was decided and denied on June 8, 1978 by the New York State Court of Appeals. As regards *Far Rockaway v. Hynes* the decision was amended by exparte request of Respondent on or about May 24, 1978.

The Notice of Appeal in both decisions were filed with the Clerk of the Court of Appeals and the Clerk for the Supreme Court in the respective counties where the matter originally arose on June 23, 1978.

(iii) Appeal is taken pursuant to Title 28 U.S.C.A. §1257(2).

(iv) Cases which Appellant believes will sustain the jurisdiction of this Court include:

New York Cases:

Matter of Heisler v. Hynes, 42 NY 2d 250 (1977).
Matter of Windsor Park v. Hynes, 42 NY 2d 243 (1977).
People v. Grogan, 260 NY 138 (1932).
In re Atlas Lathing Corp., 29 NYS 2d 458 (Sup. Ct. 1948).
Gay Cottons Inc. v. Hogan, 55 M 2d 126 (Sup. Ct. Mon. Co. 1963).

Federal cases:

Bouie v. City of Columbia, 378 U.S. 347 (1964).
Grayned v. City of Rockford, 408 U.S. 104 (1971).
Lanzetta v. State of New Jersey, 306 U.S. 451 (1939).
See v. City of Seattle, 387 U.S. 541 (1966).
United States v. Dionesio, 410 U.S. 1 (1973).

Matter of Cunningham v. Bronx Democratic Committee, 420 F.Supp. 1004 (S.D.N.Y. 1976).
Graccio v. Pennsylvania, 382 U.S. 399 (1966).
Jones v. U.S., 357 U.S. 493 (1945).
Katz v. U.S., 389 U.S. 347 (1967).
United States v. Blumberg, 38 F. Supp. 1018 (D.D.C. 1941).
United States v. Birrell, 242 F. Supp. 191, (1957).
Marshall v. Barlow's Inc., U.S. Sup. Ct. Slip.op. No. 76-1163.

(v) The validity of the following statutes are involved:

§610.25 Securing attendance of witness by subpoena; possession of physical evidence.

1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.

2. The possession shall be for a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

Added L. 1977, c451, §2. Effective Date. Section effective July 19, 1977 pursuant to L. 1977, c. 451, §6.
McKinney's New York Criminal Procedure Law §610.25, in Annual Cumulative Supplement, p. 45.

§2305. Attendance required pursuant to subpoena;

possession of books, records, documents or papers. (See main volume for text of (a) and (b)).

(c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms and conditions shall be determined with consideration for among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

As amended L. 1977, c451, §1. 1977 Amendment. Catchline, L. 1977, c. 451 §1, eff. July 19, 1977, inserted "possession of books records, documents or papers."

Subd. (c). L. 1977, c. 451, §1, eff. July 19, 1977, added subd. (c). McKinney's New York Civil Procedure Law and Rules, §2305(c), in Annual Cumulative Supplement, p. 25.

(c) Questions presented on Appeal.

1. Whether or not New York Statutes CPLR 2305(c) and CPL 610.25 are unconstitutionally vague, ambiguous and indefinite in violation of the "due process clause" of Amendment Five of the United States Constitution.

2. The authority of the prosecutor vis a vis the grand jury, specifically whether or not the prosecutor has usurped the power of the grand jury to investigate crimes and whether or not the statutes in question work an impermissible delegation of power.

3. Are New York statutes CPLR 2305(c) and CPL 610.25 unconstitutional as violative of Amendment Four of the United States Constitution?

4. Whether the evidence obtained as a result of the unauthorized retention of the subpoenaed documents should be suppressed as the 'fruit of the poisonous tree' in violation of Amendment Four of the United States Constitution.

As regards *Lerner v. Hynes* (in addition to the issues noted above).

5. Whether or not the New York Court erred when it based its findings as to the dominant purpose behind the grand jury's post-indictment investigation solely upon verbal representations made by the prosecutor.

(d) Statement of facts:

Far Rockaway Nursing Home v. Hynes

A grand jury subpoena duces tecum, served on the appellant, commanding their appearance before a Queens County grand jury and directing them to produce seventeen specified books and records of Far Rockaway Nursing Home for the period of January 1, 1970 to December 31, 1976.

Prior to the issuance of the aforesaid subpoenas duces tecum, in November 1976 a Queens County grand jury handed up an indictment for the appellant charging him with one count of conspiracy and multiple counts of violating Section 12-b(2) of the Public Health Law.

Appellant moved by Order to Show Cause to quash said subpoena duces tecum. This motion was based on the grounds that (a the subpoena was a post-indictment subpoena and the respondent's purpose was to use said subpoena as a discovery tool in preparation of trial; (b) that Sections 2305(c) of the CPLR and 610.25 of the CPL authorizing the respondent to retain books and records is unconstitutional on its face; and (c) the subpoena were too broad. In essence, appellant argued that the prosecutor was misusing grand jury subpoenas to seize his property illegally. Respondent admitted that he was using the grand jury subpoena to take possession of appellant's books and

records for examination by his assistants and by his auditors, and argued that he was entitled to do so by virtue of CPL 610.25. The Supreme Court, State of New York, Queens County by Justice George J. Balbach issued an order and decision denying the motion to quash and held CPL 610.25 and CPLR 2305(c) were valid. Appellant appealed directly to the New York State Court of Appeals, pursuant to CPLR 5601.

On January 6, 1978, the appellant served and filed a Notice of Appeal of the Order of Justice George J. Balbach, dated December 16, 1977. This States highest tribunal determined that there were sufficient constitutional issues and decided to hear this matter on direct appeal.

The Court of Appeals decided that said statutes were constitutional in accordance with their decision annexed hereto.

Pursuant to the Court of Appeals decision appealed herein, appellant moved in Supreme Court, Queens County for a hearing to determine *inter alia,* good cause by the prosecutor for the retention of the subpoenaed materials and the rights and legitimate needs of the party subpoenaed. Said hearing was held and upon completion the court ordered the records turned over to respondent. (See Appendix A).

Appellant moved for a stay pending determination of an appeal of the hearing in the Supreme Court, State of New York, Appellate Division Second Department. Said motion was denied.

Appellant also instituted an action for declaratory judgment and preliminary injunction in the Federal District Court, Eastern District of New York. Said court by Hon. Eugene Nickerson declined to exercise jurisdiction. (See Appendix A).

Hynes v. Lerner

This is an appeal from an Order directing Appellant to produce and leave books and records of the Parkview Nursing Home before a Grand Jury which had already indicted Appellant for crimes allegedly committed by him during the course of his operation of said Nursing Home.

Appellant was served with a "Subpoena (duces tecum) for witness to attend the Grand Jury." This subpoena, required Appellant to produce, before the Bronx County Grand Jury, what in substance amounts to all of the business books and records of the Parkview Nursing Home for the years 1970 through "the present."

A Motion to Quash this subpoena was made, alleging that the subpoena was unduly broad and oppressive, that compliance with the subpoena would violate Appellant's rights and privileges under the Fifth Amendment to the United States Constitution since Appellant is a target of the Grand Jury investigation, and, that Section 190.40 of the New York Criminal Procedure Law, which withholds immunity from those who only produce books and records before a Grand Jury, is unconstitutional. The Motion was denied.

Later a twenty–five count indictment against Appellant was returned by the Bronx County Grand Jury (indictment number 2543/76). This indictment charged Appellant with violation of Public Health Laws, to wit, the acceptance, contrary to normal business practices, of rebates from nursing home suppliers because of the purchase of supplies and services for the nursing home. Appellant was also charged with having conspired to so violate Public Health Laws.

After the indictment Appellant moved, before Hon. Lawrence J. Tonetti of the Bronx County Supreme Court, for an Order quashing the subpoena on the ground that the dominant purpose behind the subpoena was the gathering of information pertinent to the trial of the in-

dictment (indictment number 2543/76). The subpoenaed books and records show nursing home purchases, purchase prices, cancelled checks, invoices, etc. and such information would be instrumental to the Prosecutor, in his efforts to prove the allegations set forth in indictment 2543/76, to wit, rebates from nursing home suppliers to Appellant.

Appellant further contended in the Court below that the subpoena should be quashed even if the Grand Jury is, in fact, found to have as its dominant purpose, the investigation of crimes other than those for which Appellant was indicted since much, if not all, of the information that would be revealed by the subpoenaed materials is merely duplicative of information which the Prosecutor already has, or at least has access to, through sources other than Appellant's books and records. At the very least, it was contended that the Prosecutor should demonstrate his need for the subpoenaed materials, in light of the information to which he already has access.

Appellant also asked the Court to consider various forms of alternative relief, such as the sealing of the Prosecutor's evidentiary files with regard to indictment number 2543/76, or, the granting of an injunction restraining the Prosecutor from introducing into evidence, at the trial of said indictment, any evidence consisting of Appellant's books and records or the fruits thereof.

This Motion was argued before Justice Tonetti on January 20, 1977. At that time, the Court held an *in camera* hearing for the purpose of ascertaining the dominant purpose behind the post-indictment Grand Jury investigation. At this hearing, the only material presented consisted of verbal statements made by the Prosecutor. The actual minutes of the Grand Jury would have been made available to the Court had same been requested, but the Court determined that examination of the minutes was not necessary. No witnesses were called and no documentary evidence was presented.

Based upon this "hearing," the Court concluded that the Grand Jury's dominant purpose was the investigation of crimes other than those alleged in indictment number 2543/76.

The Prosecutor submitted to Justice Tonetti a proposed Order which, in addition to reciting the denial of appellant's motion to quash, directed appellant to "Produce *and leave*" all books and records with the Bronx County grand jury. Appellant objected to the inclusion of the words "and leave," contending instead that the grand jury acquires no property interest in subpoenaed materials and should not be permitted to retain them indefinitely. Appellant further contended that he should be permitted to take the records back at the close of one business day and return them to the grand jury at the start of the next business day. The court overruled appellant's objections and on January 25, 1977, signed the proposed order in its original form. (See Appendix B).

In July 1977, the New York State Legislature enacted the statutes questioned herein. The Court of Appeals decided the appellant's appeal on the basis of the newly enacted statutes, i.e. CPL 610.25 and CPLR 2305(c). Said court found these statutes to be constitutional, upheld the order of the court below and remanded the matter to Supreme Court, Bronx County for proceedings in accordance with its decision.

Appellant then moved in the Supreme Court, Bronx County for a hearing pursuant to CPL 610.25. Said hearing was held and upon its conclusion the court ordered that the records be turned over to the prosecutor with certain restrictions. (See Appendix B).

Appellant moved to stay the determination to the Supreme Court, State of New York, Appellate Division, First Department, pending a determination of an appeal. Said court denied appellant's motion.

Appellant also instituted an action in the Federal District Court for the Southern District of New York for a declaratory judgment and a preliminary injunction. Said court by Hon. Lawrence W. Pierce declined to take jurisdiction of the matter.

(e) Nature of the Case; Federal questions presented.

Vagueness Question

It is firmly established, in our jurisprudence that no one may suffer criminal conviction for the violation of a law which does not afford a clear and definitive description of the conduct it proscribes. *People v. Grogan,* 260 N.Y. 138, 145, (1932); *Graccio v. Pennsylvania,* 382, U.S. 399, 402 (1966). Violation of Section 610.25 of the CPL, which is vague and indefinite, would subject appellant to possible prosecution for contempt. Judiciary Law §751 and §753. The threat of prosecution based upon a vague and indefinite statute which attempts to define the relative rights and obligations of the parties to certain property is a violation of appellant's Federal due process rights.

The offending statutes, enacted after *Matter of Heisler v. Hynes,* 42 N.Y. 2d 250 and *Matte rof Windsor Park v. Hynes,* 42 N.Y. 2d 243, (1977), which questioned the constitutionality of any statute which allowed a Prosecutor to retain subpoenaed materials, is at best confusing.

In expression on the part of the drafters, paragraph "1", the court and grand jury are granted the right of *"possession"* of the subpoenaed evidence. However, such evidence may merely be *"retained"* by the "district attorney" "on behalf of the grand jury." Paragraph "1" does not give the district attorney the right of "possession" and specifically states that the evidence may merely be "retained" by the district attorney "on behalf of the grand jury." This clearly limits the authority of the district attorney, as opposed to "the court or grand jury." The legislature obviously intended to give the court and

grand jury "possession" of such evidence while limiting the district attorney to "retain" the evidence for mere storage and safekeeping on behalf of the grand jury.

Webster's Third International Dictionary, Unabridged, (Meriam-Webster, 1971 Ed.), at p. 1939 defines the verb "retain," as follows:

> "retain—vb-----
> 2a: to hold or continue to hold in possession of use----
> 3. to hold secure or intact (as in a fixed place or condition): prevent escape, loss, leakage or detachment."

"Possession," on the other hand, imparts ownership over property rather than mere control over it. Webster's Dictionary *supra,* at p. 1770.

The verb "retain" means *to hold* in possession, but not to possess. It does not imply ownership with its inherent right to examine, audit or otherwise exercise dominion and control over subpoenaed evidence. To "retain" does however, denote the function of holding materials securely as to prevent loss or escape. It would therefore appear that the district attorney may act *only* as a vessel or protector of subpoenaed materials "on behalf of the grand jury," not independently as an examiner or auditor.

Paragraph "2" of CPL §610.25 gives the district attorney no further rights. It refers only to the "possession" of the subpoenaed materials which the legislature in paragraph "1" of CPL §610.25 limited to "the court or grand jury" and which did not include the "district attorney on behalf of the grand jury." The district attorney may only retain records "on behalf of the grand jury." This phrase, as interpreted by the Court of Appeals, permits the district attorney to examine the evidence when and where he chooses, even though the grand jury is not in session and may actually never benefit from such examination. Or, even worse, the district attorney may now pick and choose what portions of the evidence will be denied to

the grand jury, thereby creating the possibility of presenting a distorted picture to the grand jury.

The most glaring deficiency of this statute is the provision which requires that the reasonableness of the grand jury's possession shall be determined with consideration for "(a) the good cause shown by the party issuing the subpoena. . . ." The statute does not state whether "good cause" must be shown to the court or the grand jury; or both; or if the court, which court. The Court of Appeals has held that the "good cause" is to be shown after the issuance of the subpoena, which is clearly inadequate.

Absent a stay which is purely discretionary the witness is forced to deliver the subpoenaed materials to the grand jury *before* the prosecutor has shown "good cause" or face contempt of court prosecution. Thus, the subpoena takes on the character and effect of a search warrant without any of the safeguards of the latter.

Fourth Amendment Considerations

New York Courts have held that grand jury subpoenas "cannot be used for the purpose of discovery of the existence of evidence" and do "not confer the power to seize or impound such records." *Gay Cottons Inc. v. Hogan,* 55 M. 2d 126, 284 N.Y.S. 2d 684, 686, (Sup. Ct. N.Y. Co. 1967), *People v. Coleman, supra, Cataldo v. County of Monroe,* 38 M. 2d (Sup. Ct. Mon. Co.), aff'd, 19 A.D. 2d 852 (4th Dept. 1963); *In re Landegger,* 269 App. Div. 736 (1st Dept. 1945); Hagan, Impounding the Subpoena *Duces Tecum,* 26 Bklyn L. Rev. 1190. Accordingly, before the enactment of the CPL 610.25 and CPLR 2305(c) the witness was entitled to take the subpoenaed material away at the end of that particular session of the grand jury.

Matter of Clarendon Laboratory and Surgical Supply Co., —— M. 2d ——(Sup. Ct. N.Y. Co. 1977), N.Y.L.J. Feb. 3, 1977, p. 10 col. 3; *Amalgamated Union Local 224 v. Levine,* 31 M. 2d 416, 219 N.Y.S. 2d 851, 853 (Sup. Ct. Nassau Co. 1961); *Application of Bendix Aviation Corp.,* 58 F. Supp. 953 (S.D.N.Y. 1945); and most recently, *Matter of Heisler v. Hynes,* 42 N.Y. 2d 250 (1977). The Court in *United States v. Blumberg,* 38 F. Supp. 1018 (D.D.C. 1941), has definitively held that a "subpoena *duces tecum* may not be used as a type of search warrant."

A search warrant may not be issued unless the court is satisfied that there is reasonable cause to believe that certain property may be found at a specified place or person. CPL §690.40(2). The warrant allows a police officer to seize the designated property and bring it before the court. CPL §690.05. Other protections afforded by statute with a search warrant, but which are not present in CPL §610.25, include but are not limited to:

1. Reasonable cause to believe that personal property is stolen, unlawfully possessed or can be used as evidence, (690.10);*

2. Designated premises, vehicle or person (690.15);

3. Specific courts which may issue said warrants (690.20);

4. A limited geography wherein the police officer is employed and the warrant executed (690.25);

5. A ten day limitation between the date of issuance and the day of execution (690.30);

6. The application for a search warrant must be in writing, sworn to and must contain, among other things the applicants' statement that there is reasonable cause to believe specified property is in a special place and sworn allegations to support said belief (690.35); and

7. Certain specifications as defined by CPL §690.45. Perhaps most important is the fact that application for

*Indicates section in the Criminal Procedure Law.

search warrant must be made to an independent magistrate *before* issuance. There is no such mechanism provided in CPL 610.25. This failure to provide an "indispensable condition" renders the statute unconstitutional. *Mencusi v. DeForte,* 392 U.S. 364 (1968).

Reasonable cause for the issuance of a search warrant "exists where there is reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated on the premises to be searched." *People v. Danzig,* 40 AD 2d 576 (4th Dept. 1972); See also *Carroll v. United States,* 267 U.S. 132; and *Dumbra v. United States,* 268 U.S. 435.

The sole protection in CPL §610.25 is that the party issuing subpoena have "good cause shown" for its issuance. There are none of the safeguards which are required for a search warrant to issue, even though the resultant change in possession of property is the same in both instances.

Federal Questions Involved

The constitutional deficiencies in this statute cannot be cured by judicial construction in this very case, by placing valid limits on the statute. *Bouie v. City of Columbia,* 378 U.S. 347 (1964). The *Bouie* Court explained;

> "The objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the trier of fact. The former objection could not be cured retrospectively by a ruling either of the trial court *or the Appellate Court. . . .*" Freund, "The Supreme Court and Civil Liberties," 4 Vand L. Rev 533, 541 (1951), cited favorably in *Bouie v. City of Columbia, supra,* at 352, 353.

A second consideration is important in demonstrating the dangers of a vague statute. In *Grayned v. City of*

Rockford, 408 U.S. 104, 108-109 (1971), the Supreme Court explained the dangers inherent in a vague statute:

> "A. Vagueness
> It is a basic principle due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissible delegates basic policy matters to policemen, judges, and juries* for resolution *on* an ad hoc and *subjective basis, with the attendant dangers of arbitrary and discriminatory application.* Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably leads citizens to 'steer far wider of the unlawful zone'. . . . than if the boundaries of the forbidden areas were clearly marked." (Emphasis added).

Whatever the legislature's intent may have been is of little consequence to this Court in determining the meaning of the statute. As stated in *Connally v. General Construction Co., supra:*

> "Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test that the legislature meant one thing rather than another."

If on its face the challenged provision is repugnant to the due process clause, a specification by a Court as to

what is intended would not serve to validate the statute. *Lanzetta v. State of New Jersey,* 306 U.S. 451, 453 (1939) *Cf. International Harvester Co. v. Kentucky.*

Even if the Court of Appeals had determined a workable standard for "good cause" it would still not make CPL §610.25 definite enough to pass constitutional muster, as applied to the plaintiffs. *Connally v. General Construction Co., supra,* Freund, "The Supreme Court and Civil Liberties," *supra.* Any ruling concerning "good cause" would be prospective only. It may not be applied retroactively to these defendants. *Connally v. General Construction Co., supra.*

The prosecutor is not prejudiced by being unable to independently examine the records of plaintiffs. He has the power to audit within the Nursing Home itself, which avoids the disturbance of possession of property from its owner. In the event the prosecutor has sufficient evidence to support his belief that a crime has been committed he may apply for a search warrant. Finally, as pointed out by the Court of Appeals in *Heisler v. Hynes, supra,* the prosecutor may, under the traditional concept and use of a subpoena duces tecum, elicit evidence by skilled questioning and presentation before the Grand Jury.

It is a well settled law that, there exists a constitutional nexus between the Fourth Amendment and subpoenas duces tecum. *See v. City of Seattle,* 387 U.S. 541, 544 (1966); *United States v. Dionesio,* 410 U.S. 1 (1973). The Fourth Amendment requires that the subpoena be sufficiently *limited in scope,* relevant in purpose and specific in directive so that compliance would not be burdensome. *See v. City of Seattle, supra,* at 544. The Grand Jury subpoena duces tecum is certainly not some talisman that dissolves all constitutional protections, *U.S. v. Dionesio, supra,* at 11.

The prosecutor's intended use of the subpoena duces tecum is to seize and retain the property of the plaintiffs in

the same manner as a search warrant. However, CPL §610.25 does not provide safeguards which are necessary with a search warrant.

The question raised by CPL §610.25 is really whether a subpoena duces tecum may be substituted for a search warrant.

The answer is that a subpoena duces tecum can now do *more* than a search warrant with *less* constitutional protections. The statute allows the Grand Jury to obtain possession of plaintiffs' property without any prior showing of probable cause. The only protection which the statute affords is that the defendant show good cause, and then it is unclear whether even this standard is necessary to obtain possession in the first instance. Further, a subpoena duces tecum obviates the need for a prosecutor to show specificity of what the subject matter is. This allows for a greater possibility of a "fishing expedition," and a further deprivation of plaintiffs' rights.

Role of District Attorney vis a vis the Grand Jury.

The role of the district attorney in grand jury proceedings is limited, due to the traditional concept of the grand jury's functions.

The dual function of the grand jury is to investigate crime within the county where it sits and to protect the innocent from unfounded accusations. In *People v. Rosen,* 74 N.Y.S.2d 624 (Kings Co. Ct. 1947) the court stated:

> "It appears to be not very well known, but it is nevertheless a fact that the grand jury was first created hundreds of years ago for the purpose of protecting individuals against oppression and not for the purpose of assisting in the prosecution of crime. We often tend to forget that the *primary purpose* of the grand jury was to protect the citizens against such misuse of government power."

Article 1 §6 of the New York State Constitution reflects these concerns by providing:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on indictment by the grand jury."

Thus, if the district attorney were permitted independent use, or misuse, of grand jury evidence, then the grand jury would be deprived of its "primary purpose," i.e. "to protect the citizen against such misuse of government power." Unfortunately, we have seen too many such instances of misuses of government power, especially by special prosecutors.

A grand jury, which is mandated by the Constitution, cannot delegate its power to the government, if it is to protect citizens against misuse of government power. If the district attorney is permitted to use the grand jury subpoena power with unsupervised access to grand jury evidence, outside the presence of the grand jury, then this would destroy the autonomy and independence of the grand jury.

Hynes v. Lerner

The conclusion reached by the New York courts, to wit, that the dominant purpose behind the Grand Jury's post-indictment investigation, was an inquiry into the commission of alleged crimes other than those charged in the prior indictment, was based solely upon verbal representations made, *in camera* by the Prosecutor. These self serving statements cannot even be referred to as testimony, since there is no indication, in the record, that the Prosecutor was placed under oath. It was stated that a Court in evaluating the validity of a witness' objections to proceedings of the Grand Jury, "may, in its discretion interrogate the Prosecutor under oath, either *in camera* or in open court. . . ." *People v. Einhorn,* 35 N.Y. 2d 948, 965, N.Y.S. 2d 171, 172 (1974).

In the case now at bar, the indictment is, in essence, based upon the alleged payment of rebates to the appellant, by a vendor who dealt with the appellant as the administrator and partner of the nursing home whose records are the subject of the instant motion to quash. The subpoenaed records, which include, *inter alia* purchase orders, invoices, cancelled checks, etc., are certainly relevant to the issue of whether or not rebates were accepted. Indeed, the prosecutor herein has never seriously disputed the relevancy of the subpoenaed materials to the trial of the pending indictment. Thus, appellant's contention that the dominant purpose of the post-indictment grand jury proceedings is for the purpose of preparing for trial of the pending indictment, is, apparent from an examination of the books and records requested in said subpoena. Thus, some extrinsion evidence concerning the dominant purpose of the grand jury investigation is necessary.

In situations where the pre-existing indictment and post-indictment inquiry is similar in scope the courts have, as a general rule, examine grand jury minutes where same are in existence. *United States v. Doss,* 545 F.2d 548 (6 Cir. 1976); *United States v. Sellaro,* 514 F.2d 114 (8 Cir. 1973); *United States v. Doe,* 455 F. 2d 1270 (1st Cir. 1972); *United States v. Dardi,* 330 F. 2d 316 (2d Cir. 1964); *United States v. Kovaleski,* 406 F. Supp. 267 (E.D. Mich. 1976).

In the *United States v. Sellaro,* 514 F. 2d 114 (8 Cir. 1973), potential defense witnesses were, after defendant had been indicted, called before the grand jury and required to give testimony. Defendant alleged that this was done for the purpose of harassing these witnesses. The lower court found that the post-indictment grand jury investigation was bona fide, and dismissed defendant's contentions. The Court of Appeals affirmed this finding only after having first studied transcripts of testimony given by these witnesses before the grand jury.

In *United States v. Doss,* 545 F. 2d 548 (6 Cir. 1976), defendant was indicted and convicted for perjury committed before a grand jury. When he was called to testify before the grand jury, defendant was not informed of the fact that indictments against him had already been returned. The court, holding that the dominant purpose of the post-indictment grand jury investigation was the preparation for trial of pending indictment and that the calling of defendant to testify after the indictment was improper, reversed the perjury conviction. The conclusion of the court as to the grand jury's dominant purpose was based upon the court's examination of a transcript of defendant's testimony before the Grand Jury.

In *United States v. Doe,* 455 F. 2d 1270 (1st Cir. 1972), defendant was indicted by a grand jury in California. Thereafter, defendant sought to stay a grand jury investigation in Massachusetts, on the ground that the latter investigation was designed to prepare for trial of the California indictment. This claim was plausible, since the same prosecutors handled both the California and Massachusetts' cases. The prosecutor represented to the court that the grand jury in Massachusetts was investigating alleged crimes which occurred in Massachusetts. The First Circuit, being reluctant to base a conclusive finding as to the grand jury's dominant purpose solely upon such a representation, held that the transcript of the grand jury proceedings, when available, would become available to the California court if the latter wished to inquire into whether or not the dominant purpose of the Massachusetts' investigation was preparation for the trial of the California indictment.

The post-indictment discovery of appellant's books and records, would prejudice appellant with respect to the trial of the pending indictment, since these books and records are certainly relevant to the issues to be raised at the trial of the pending indictment. If respondent is to be

permitted such post-indictment discovery of appellant's books and records, the respondent should be required to prove more than mere allegations that the dominant purpose of the grand jury investigation is legitimate. He should be required at least to prove by competent evidence that all the subpoenaed nursing home books and records were necessary and proper for the grand jury investigation of "other" crimes. This is especially so where the prosecutor has indicated an intention to utilize evidence revealed by these books and records at the trial of the pending indictment. (Transcript, 1/20/77, p. 17).

The concept that the prosecutor should be restrained from utilizing the evidence challenged herein, while novel in the context of a post-indictment grand jury investigation, is not, however, foreign to the general law of evidence. As a general rule, evidence, although proximately relevant to the issues, is inadmissible if the probative value of the evidence is substantially outweighed by the danger that its admission will duly prejudice the adverse party. *(United States v. Kovaleski,* 406 F. Supp. 267 (E.D. Mich. 1976)

Respectfully submitted,

GEORGE S. MEISSNER

APPENDIX A

ORDER APPEALED FROM

In the Matter of FAR ROCKAWAY NURSING HOME et al., Appellants, v. CHARLES J. HYNES, as Deputy Attorney-General of the State of New York, Respondent.

Argued March 29, 1978; decided May 4, 1978

OPINION OF THE COURT

JASEN, J.

In these three cases involving Mountain View Home for Adults, Queens Nassau Nursing Home and Far Rockaway Nursing Home, all of which present substantially the same issues, direct appeals are taken on constitutional grounds from three separate orders of the Supreme Court.

The Mountain View Home appeal is taken from an order directing compliance with a subpoena duces tecum issued by respondent, the Special Prosecutor for Nursing Homes (Deputy Attorney-General), on October 7, 1977. The subpoena required the production of various books and records of the home at the office of the Special Prosecutor. The schedule attached to the subpoena, detailing the specific items sought, included 24 general categories of books and records encompassing essentially all appellant's business records.

When it became apparent that appellant nursing home would not comply with the subpoena, the Special Prosecutor moved for an order to compel compliance pursuant to CPLR

2308 (subd [b]). In addition to seeking production of the documents, the Special Prosecutor also sought "possession * * * [of the subpoenaed materials] for the inspection, examination or audit" as authorized by subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd [c]). Appellants[1] opposed the motion alleging that subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd [c]) violate the Fourth Amendment proscription against unreasonable searches and seizures. The statutes were also challenged as being unconstitutionally vague, and it was further argued that compulsion to produce potentially incriminating evidence contravenes the constitutional right against self incrimination.

In support of the motion to compel compliance, the Special Prosecutor argued that several allegedly illicit activities conducted at the home justified both the investigation and the subpoena. The Special Prosecutor informed the court that a sexual abuse complaint had been lodged against a resident of the home, that a number of residents had been improperly transferred to the home, and that a civil action was pending against the home for improperly withholding funds.

After a hearing, Supreme Court directed that the subpoenaed books and records be delivered to the Special Prosecutor no later than 5 P.M. on December 20, 1977. Because of the pending appeal, a motion to stay enforcement of the subpoena has been granted, and the subpoenaed materials have been placed in the custody of the Clerk for the County of Rockland.

In the Queens Nassau Nursing Home case, direct appeal is taken on constitutional grounds from an order of Supreme Court, Queens County, denying appellant's motion to quash a Grand Jury subpoena duces tecum issued on August 1, 1977. Appellant contends that the statute authorizing the Grand Jury and the Special Prosecutor to retain the subpoenaed materials is unconstitutionally vague, violative of the Fourth Amendment proscription against unreasonable searches and seizures, and contrary to the purpose of the Grand Jury as a body immune to governmental interference and control.

Review of the history of this case is necessary to understand fully its posture. On November 1, 1976, a Queens County Grand Jury subpoena duces tecum was served on appellant Herman Greenbaum, a partner of Queens Nassau Nursing

1. Laurence Moskowitz, Manager of Mountain View Nursing Home, was also served with a subpoena and is a party in this proceeding.

Home, commanding production of the books and records of the nursing home for 1973 to 1976. Greenbaum moved to quash the subpoena on the grounds that it violated his constitutional right against self incrimination, that the subpoena was overbroad and that it had been served improperly. On November 5, 1976, the motion was denied.

Subsequently indicted on one count of conspiracy in the fourth degree and 22 counts of willful violation of the health laws, Greenbaum was arraigned on November 16, 1976. The indictment charged that Greenbaum had engaged in a scheme to obtain kickbacks from a vendor of the nursing home.

On December 2, 1976, Greenbaum appeared before the Grand Jury, and produced only some of the subpoenaed materials. An oral motion seeking return of the records was denied. This motion was renewed in writing. In denying the renewed motion, Supreme Court permitted Greenbaum to be present during examination of the records if he so desired, but on reargument the order was modified to disallow Greenbaum's presence during inspection.

Faced with Greenbaum's persistent refusal to comply with the subpoena, the Special Prosecutor moved to have Greenbaum held in contempt. Supreme Court, Queens County, withheld decision pending our determination of *Matter of Heisler v Hynes* (42 NY2d 250) and *Matter of Windsor Park Nursing Home v Hynes* (42 NY2d 243). The holding in those cases, forbidding the Special Prosecutor from retaining custody of the documents sought by a Grand Jury or officer subpoena duces tecum, absent statutory authority, prompted the Special Prosecutor to withdraw the contempt motion.

Shortly after the *Heisler* and *Windsor Park* decisions, the Legislature enacted CPL 610.25, which authorized limited possession and retention by the Special Prosecutor of materials subpoenaed by the Grand Jury. The Grand Jury subpoena duces tecum now challenged was issued on August 1, 1977, pursuant to the newly enacted CPL 610.25. It required production of 17 categories of books and records of the home from 1973 to 1976. A motion to quash the subpoena on the ground that CPL 610.25 is unconstitutional was denied. Pending resolution of this appeal, the subpoenaed records have been impounded by the Supreme Court, Queens County.

In the Far Rockaway Nursing Home case, Laszlo Szanto, a partner in the nursing home, was served with a Grand Jury subpoena duces tecum on August 1, 1977, commanding pro-

duction of books and records of the home for 1970 to 1976. A motion to quash the subpoena on grounds of unconstitutionality was denied by Supreme Court, Queens County.

This history of this case is similar to that of the Queens Nassau Nursing Home case. In October of 1976, a Grand Jury subpoena duces tecum was issued to Szanto commanding production of the home's books and records. Szanto moved to quash the subpoena, asserting his constitutional right against self incrimination. He also alleged that the subpoena was overbroad, and was served improperly. On November 5, 1976, the motion was denied.

On November 12, 1976, Szanto was indicted on one count of conspiracy in the fourth degree and 14 counts of willful violation of the health laws. As was the case with Greenbaum, Szanto was charged with involvement in a kickback scheme.

Because Szanto refused to comply with the subpoena, the Special Prosecutor moved to hold him in contempt. Supreme Court, Queens County, ordered that Szanto would be held in contempt if he failed to comply with the subpoena by June 7, 1977. The *Heisler* and *Windsor Park* decisions, however, prompted the withdrawal of the contempt motion.

Passage of CPL 610.25 led to the issuance of the presently challenged Grand Jury subpoena duces tecum. Denying appellants' motion to quash, Supreme Court, Queens County, held the statute constitutional, and ordered that the subpoenaed documents be placed in the custody of the Supreme Court, Queens County. However, most of the documents have not been delivered to the court due to an alleged burglary at Far Rockaway Nursing Home which allegedly occurred on June 6, 1977.

Before proceeding to the various constitutional arguments raised against the three challenged statutes, a general overview of these provisions will be instructive. CPL 610.25[2] pro-

2. CPL 610.25, effective July 19, 1977, provides as follows:

"Securing attendance of witness by subpoena; possession of physical evidence.

"1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.

"2. The possession shall be for a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in

(n. contd.)

vides that where a subpoena duces tecum is issued upon reasonable notice to the subpoenaed party, "Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury." The reasonableness, duration and conditions of such possession shall be determined by the court with consideration for, among other things, the "good cause" shown by the issuing party, the rights and legitimate needs of the subpoenaed person, and the feasibility and appropriateness of copying the subpoenaed material.

Subdivision 8 of section 63 of the Executive Law[3] empowers the Attorney-General to issue office subpoenas duces tecum and to possess and retain subpoenaed materials in accordance with the provisions of the CPLR. In language nearly identical to that of CPL 610.25, CPLR 2305 (subd [c])[4] provides the bounds of reasonable possession and retention of subpoenaed documents.

On the present appeal, in Queens Nassau and Far Rockaway, CPL 610.25 is challenged as being unconstitutionally vague in violation of the constitutional right to due process of law in that the statute fails to define what is meant by the

whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice."

3. Amended subdivision 8 of section 63 of the Executive Law, effective July 19, 1977, provides: "8. * * * The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require *that* any *books, records, documents or papers* relevant or material to the inquiry *be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.* If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor."

4. Effective July 19, 1977, subdivision (c) was added to CPLR 2305. The new subdivision provides in pertinent part: "(c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material."

phrase, "good cause shown by the party issuing the subpoena", and that the statute fails to specify whether "good cause" must be shown prior to the issuance of the subpoena or only upon challenge to the possession of the subpoenaed documents. The same vagueness argument is raised in Mountain View, attacking the constitutionality of CPLR 2305 (subd [c]) and subdivision 8 of section 63 of the Executive Law. Because CPL 610.25 and CPLR 2305 (subd [c]) are cast in nearly identical language, challenges that they are unconstitutionally vague will be considered together.

[1] We conclude that the statutes are not unconstitutionally vague in either respect. A reading of the statutes quickly dispels the slightest trace of ambiguity. We believe the phrase "good cause shown by the issuer", as it appears in the statutes, means precisely what it says—good reason to be shown by the issuer why the possession required by the subpoena should be continued for a reasonable time. It does not refer to something which the issuer must show the court *before* a subpoena is issued, but, rather, it refers to one factor "among other things" to be considered by the court in determining a challenge by the subpoenaed party *after* the subpoena is issued as to the extent of possession to which the issuer of the subpoena is entitled.[5] Good cause means, then, a sufficient justification to possess the subpoenaed documents for a reasonable period of time in conjunction with the pending investiga-

5. The Practice Commentary regarding CPL 610.25 relates the legislative purpose of the challenged provisions.

"This amendment is part of an integrated package involving CPLR 2305, Penal Law § 215.70, Executive Law § 63, subdivision 8, and CPL § 190.25.

"It was sought by the Attorney General and the Special Prosecutor for Nursing Homes in order to offset and effectively overrule Matter of Heisler v. Hynes, 42 N.Y.2d 250, and Matter of Windsor Park Nursing Home v. Hynes, 42 N.Y.2d 243, decided by the Court of Appeals on July 7, 1977, reargument denied, 42 N.Y.2d [1015], September 9, 1977.

"In what has to be one of the speediest legislative overrulings of a judicial determination in recorded history, these amendments were approved as law and became effective on July 19, 1977.

"The net purpose, assuming constitutionality of the new legislative package is to permit the subpoenaing agency to retain in its possession books, documents and records for examination and audit.

"The length of time and the terms and conditions for retention are set forth in the statute and a practical balance is sought to be struck between the good cause shown by the subpoenaer and the rights and needs of the subpoenaed including feasibility of reproduction with all costs to be borne by the subpoenaer unless the Court determines otherwise in the interest of justice." (Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 610.25.)

tion. Indeed it would be anomalous to require an in-court showing of good cause for possession prior to issuance since the very validity of the subpoena need not be demonstrated in court before the subpoena issues.

And if more need be said, reference to the legislative history conclusively establishes the intended statutory meaning. The intent behind the new law was explained as follows: "[F]or the first time in New York law the witness whose records are subpoenaed will have some specific statutory safeguards to assert, to limit the prosecutor's power and to protect the witness' rights in terms of possession and in terms of the times and conditions of that possession".

"[T]here could be recourse in the courts either on a motion to compel or a motion to quash or modify * * * *No court order is required though in advance*". (Emphasis added.) (Statement made before State Assembly, Richard Gottfried, Chairman of the Assembly Codes Committee.)

[2, 3] We would also observe that the statutes do not affect the law as it existed prior to their enactment with respect to the obligation of a person served with a nonjudicial subpoena duces tecum. A person subject to a nonjudicial subpoena duces tecum may challenge it in court if the subpoena requires the production of irrelevant or immaterial documents *(Carlisle v Bennett,* 268 NY 212), or is used as an instrument of harassment *(Matter of A'Hearn v Committee on Unlawful Practice of Law of N. Y. County Lawyers' Assn.,* 23 NY2d 916, cert den 395 US 959). Likewise, where the subpoenaed person fails to comply with the subpoena, the issuer may move to compel compliance. On such a motion, the issuer must show that the items sought to be subpoenaed "have some relevancy and materiality to the matter under investigation". *(Carlisle v Bennett, supra,* at p 218; *Matter of La Belle Creole Int., S. A. v Attorney-General of State of N. Y.,* 10 NY2d 192, 196.) While a showing of probable cause or probative evidence to suspect illicit activity need not be shown to support a subpoena, evidence so scant that it does not legitimately raise an issue of impropriety is not enough. *(Myerson v Lentini Moving & Stor. Co.,* 33 NY2d 250, 256.) Bifurcation of the power, on the one hand, of the public official to issue subpoenas duces tecum and, on the other hand, of the courts to enforce them, is an inherent protection against abuse of subpoena power. The statutes challenged as vague in these cases do not alter these well-settled principles in any way, for they speak only to the

right and duration of possession of subpoenaed documents, and not to the validity of the subpoenas.

[4] It is further argued by appellants that the challenged statutes are violative of the Fourth Amendment proscription against unreasonable searches and seizures in authorizing the seizure and retention of subpoenaed materials without a showing of probable cause. We find this argument unpersuasive. Unlike searches and seizures, where a preliminary showing of probable cause is required before a warrant may issue, a Grand Jury is not saddled with such a requirement in issuing a subpoena duces tecum. To do so would assuredly impede its broad investigative powers to determine whether a crime has been committed and who has committed it. All that is required under the State and Federal Constitutions is that the subpoenaed materials be relevant to the investigation being conducted and that the subpoena not be overbroad or unreasonably burdensome. *(Myerson v Lentini Moving & Stor. Co.,* 33 NY2d 250, *supra; Matter of Horowitz,* 482 F2d 72, 75-79, cert den 414 US 867.)

This constitutional guarantee seeks to balance the interests of society in discovering evidence of criminal activity with the right of the individual to be free from unjustifiable governmental intrusions. To be sure, an intrusion imposed on a person subject to a search and seizure is substantial. A search is conducted without advance notice and the scene of the search may be an individual's home. Where resistance is encountered, the search may be effected by the threat or use of force. These considerations demand that a warrant issue only if supported by probable cause.

But these considerations do not apply with equal force to the Grand Jury subpoena duces tecum. *(Hale v Henkel,* 201 US 43, 76.) It is served in the same manner as any other legal process, and may be challenged, before compliance, in a motion to quash. *(Matter of Manning v Valente,* 272 App Div 358, affd 297 NY 681; *United States v Doe [Schwartz],* 457 F2d 895, 898, cert den 410 US 941.) If the motion to quash is denied and compliance ordered, no search is conducted, nor is there a threat or actual use of force. *(Matter of B. T. Prods. v Barr,* 44 NY2d 226.) Rather, the materials sought are furnished by the subpoenaed person himself at a time and place prescribed by the court. It should also be noted that a search warrant, unlike the subpoena, is not a preliminary investigatory tool, but is rather a device for obtaining evidence intended to be used against a defendant where probative support of his guilt is already known to the authorities. Clearly, the concerns which require that constitutional protections attach when a warrant issues do not apply equally when an investigatory subpoena duces tecum is served. Hence, "a subpoena to appear before a grand jury is not a 'seizure' in the [constitutional] sense, even though that summons may be inconvenient or burdensome." *(United States v Dionisio,* 410 US 1, 9.)

It is also noteworthy that the challenged subpoenas seek the production of business records and not personal papers. The applicability of the State and Federal Constitutions which protect personal papers from unreasonable searches and seizures has been questioned where a subpoena seeks those types of business records concerning which there is no serious expectation of privacy. (E.g., *United States v Miller,* 425 US 435, 445.) This is particularly true of records of a business subject to governmental control or license.

[5] Turning to the challenged statute, CPL 610.25, which goes beyond the mere authorization of Grand Jury subpoenas by providing for the limited possession and retention of the subpoenaed records by the issuer, consideration must be given to whether the statute provides adequate safeguards to insure that the retention of subpoenaed items serves a legitimate public purpose and is reasonable in its scope and duration. *(Robert Hawthorne, Inc. v Director of Internal Revenue,* 406 F Supp 1098, 1106.) That the challenged statute serves a legitimate public purpose in facilitating the Grand Jury to conduct investigations is clear. But to allow the Grand Jury to possess subpoenaed records indefinitely or to possess documents not needed for investigative purposes might well signal a violation of constitutional standards. The challenged statute safeguards against such abuses providing that "[t]he reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence." These guidelines set the bounds of reasonableness regarding the conditions and duration of the retention of subpoenaed materials. The Grand Jury is not given unchecked power to hold subpoenaed records indefinitely. On a motion to limit the

possession of subpoenaed materials, the reasonablenss of the terms and duration of possession will be determined by the court. Hence, we believe such statutory safeguards comply with constitutional requirements. They help insure the smooth and uninterrupted functioning of the Grand Jury, while limiting the intrusion borne by those who are the subject of investigation.

Moreover, appellants' contention that CPL 610.25 allows the District Attorney to pervert the function of the Grand Jury is also without merit. It is true, as appellants urge, that one of the purposes of the Grand Jury is to provide a buffer between the prosecutor and the criminal suspect. Thus, the issuance of indictments by the Grand Jury must be made independently. The Grand Jury, however, is also an investigatory body with broad inquisitorial powers, and the District Attorney is its legal advisor. (CPL 190.25, subd 6.) To discharge its responsibility of criminal investigation most effectively, the Grand Jury must act in close co-operation with the District Attorney. So long as the subpoenaed materials relate to a legitimate Grand Jury investigation, it would defy common sense to deprive the District Attorney access to them.

[6] By like reasoning, subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd [c]), which provide for the retention of documents acquired by an office subpoena issued by the Attorney-General, must also be held constitutional. As is true of the Grand Jury subpoena duces tecum, the office subpoena duces tecum imposes only a minor infringement on one's expectation of privacy. Thus, we conclude that the same relatively relaxed constitutional standards as were applied to CPL 610.25 be applied in testing the validity of subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd [c]). *(Oklahoma Press Pub. Co. v Walling,* 327 US 186, 195.) Our inquiry is, therefore, limited to whether these statutes promote the public interest and prescribe sufficient safeguards that the terms of retention will not unduly burden the subpoenaed party.

That the Attorney-General serves a vital public purpose is beyond doubt; he is given broad investigatory responsibilities in matters of public safety and welfare. We have already concluded that investigation into the rampant corruption in nursing homes is a proper exercise of this authority. *(Matter of Sigety v Hynes,* 38 NY2d 260, cert den 425 US 974.) To facilitate his effectiveness in carrying out such investigations,

the Legislature has granted the Attorney-General the power to issue subpoenas, and to retain custody of the subpoenaed materials within the bounds of reasonableness.

While the duration and terms of retention must, of course, comport with constitutional standards, we are satisfied that CPLR 2305 (subd [c]) meets these standards for it provides precisely the same detailed guidelines as does CPL 610.25 to assure that the retention of the subpoenaed documents will be supported by good cause and will be limited to a reasonable period of time. In addition, the statute provides that the needs of the subpoenaed party be considered to assure that the possession of the subpoenaed records by the Attorney-General will not prove unduly onerous to the subpoenaed party. The Constitution demands no more.

Accordingly, the orders of Supreme Court, Queens County, and Supreme Court, Rockland County, should be affirmed, with costs.

Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

In each case: Order affirmed, with costs.

FEDERAL COURT DETERMINATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C 1179

FAR ROCKAWAY NURSING HOME and LASZLO SZANTO,

Plaintiffs,

-against-

CHARLES J. HYNES, Deputy Attorney General, Special Prosecutor for Nursing Homes, Health and Social Services,

Defendant.

NICKERSON, District Judge

On June 5, 1978, plaintiff filed the complaint in this action asking for injunctive and declaratory relief from a state grand jury subpoena duces tecum. Plaintiff also sought to move by order to show cause for a preliminary injunction. The court declined to issue the order to show cause until plaintiffs had informed defendant of the motion. Counsel for the parties appeared on June 7, argument was had, and the court allowed counsel until noon on June 8 to submit further papers. The court then signed the order to show cause but denied the temporary restraining order requested by plaintiffs.

The Court of Appeals for the Second Circuit has often stated the factors to be considered on an application for a preliminary injunction: the likelihood of the movant's eventual success on the merits; the irreparability

of harm should preliminary relief be denied; the balance of hardship as between the parties; and the effect of preliminary relief on the public interest. *Barabas v. Prudential Lines, Inc.*, F.2d (2d Cir. May 31, 1978); *New York Pathological & X-Ray Laboratories, Inc., v. Immigration and Naturalization Service,* 523 F.2d 79 (2d Cir. 1975); *Hudson Tiremart, Inc. v. Aetna Cas. and Sur. Co.,* 518 F.2d 671 (2d Cir. 1975); *Columbia Pictures Indus., Inc. v. American Broadcasting Cos.,* 501 F.2d 894 (2d Cir. 1974); *Sonesta Int'l. Hotels Corp. v. Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973). Since there is no possibility of eventual success by plaintiffs and a serious public interest would be thwarted should a preliminary injunction be granted, relief is denied.

Plaintiff Szanto is a partner in plaintiff Far Rockaway Nursing Home ("the Nursing Home"). Indicted in November 1976 in the New York courts on 15 counts alleging conspiracy and substantive violations of the public health laws, Szanto was served on or about August 1, 1977 with a subpoena duces tecum returnable before a Queens County Grand Jury. The subpoena directed him to produce a variety of financial records and documents of the Nursing Home for purposes of a nursing homes investigation directed against persons unnamed.

Plaintiffs moved in the Criminal Term of Supreme Court, Queens County to quash the subpoena, alleging: 1) abuse of the grand jury subpoena power by post-indictment subpoena; 2) overbreadth of the subpoena; and 3) unconstitutionality of §610.25 of the New York Criminal Procedure Law ("C.P.L."), the statutory authority for the subpoena.

Justice George J. Balbach denied plaintiffs' motion on December 16, 1977. He found that "the nursing home prosecutor is utilizing the present subpoena to investigate other charges than the ones [plaintiffs are] presently accused of." Thus, the court determined that the subpoena was

not abusive as reopening a completed indictment. The court also concluded that the subpoena was not an unreasonable search and seizure within the meaning of the Fourth Amendment and then addressed the constitutionality of §610.25 of the C.P.L.

Plaintiffs argued that the section deprived them of property without due process by permitting the grand jury to retain possession of the subpoenaed material "for a period of time, and on terms and conditions, as may be reasonable required for the action or proceeding." C.P.L. §610.25(2). Justice Balbach held that such a right of retention was a reasonable exercise of state power and that the statute creating the right was intended to remedy "some actual and manifest evil."

Plaintiffs appealed directly to the New York Court of Appeals, which unanimously affirmed on May 4, 1978. Judge Jasen, writing for the Court, held that the statute was not impermissibly vague; that the subpoena did not violate the Fourth Amendment; and that the right of retention created by the statute was hedged by adequate safeguards and was appropriately related to the function of the grand jury. Plaintiffs have not sought review of the Court of Appeals decision in the Supreme Court of the United States.

In the present action plaintiffs allege that enforcement of the subpoena is unconstitutional on the grounds that C.P.L. §610.25 is vague (complaint ¶¶6 and 9), that the retention of the records would violate plaintiffs' rights to be free from unreasonable search and seizure and deprive them of property without due process (*Id.* ¶¶8, 10 and 11), and that the post-indictment use of a grand jury subpoena violates due process (*Id.* ¶16). The complaint seeks declaratory and injunctive relief against enforcement of the subpoena and C.P.L. §610.25. Meanwhile defendant has moved in New York Supreme Court to enforce the subpoena.

A. *Effect of the State Court Proceeding*

Based upon these facts the complaint states no sufficient claim in this court. All the issues raised here were presented to Justice Balbach in the state court, fully developed before him, and decided by him. His order was affirmed at the highest level of the state court system. Plaintiffs cannot now relitigate the same issues.

In *Winters v. Lavine,* F.2d (2d Cir. Docket No. 77-7101, decided January 16, 1978), the Second Circuit discussed the circumstances under which the determination of an issue in a state proceeding is conclusive in a subsequent federal court action. In that case the plaintiff brought an action under 42 U.S.C. §1983 claiming that she had been unconstitutionally denied Medicaid benefits for "medical" treatment administered by Christian Science "practitioners" and "nurses" so as to deprive her of her First Amendment right to free exercise of religion. She had earlier been denied relief in an Article 78 proceeding in the New York Appellate Division reviewing the action of the New York Department of Social Services denying the benefits. Her appeal to the New York Court of Appeals was dismissed, and the Supreme Court denied certiorari. In her action in the Federal court the plaintiff made the same argument as to denial of First Amendment rights as she had made in the state courts.

The Second Circuit held that whether New York or Federal law applied the plaintiff could not relitigate the matter.[1] If New York law applied (through 28 U.S.C. §1738, giving state court judicial proceedings full faith and credit), where the parties are the same and the state and federal causes of action are identical, issues actually litigated and issues which might have been but were not litigated could not be raised in the Federal Court. *Winters v. Lavine, supra,* Slip Op. at 6495-96. The Court recognized that in certain civil rights cases[2] a more diluted, federal

version of *res judicata* had sometimes been applied, limiting the preclusive effect of the state judgment to issues actually litigated and determined. *Id.* at 6496-98. See also *Ornstein v. Regan,* F. 2d (2d Cir. Docket No. 77-7307, decided April 4, 1978). But even in civil rights cases where the causes of action are not identical, a party may not raise an issue actually litigated and determined adversely, so long as the determination was necessary to the earlier decision and the party has had a full and fair opportunity to contest the issue. *Id.* at 6498-6500 and 6501 n. 14.

Plaintiffs' claims in this action are barred whether federal or state law is applied. The opinions of Justice Balbach and the New York Court of Appeals demonstrate that plaintiffs pressed a broad attack on both the subpoena and C.P.L. §610.25 in the state courts. All the constitutional issues raised here were discussed in one or both of the opinions, and all were decided adversely. Since plaintiffs were unsuccessful in the state courts, each adverse determination was necessary to the state court's decisions.

Plaintiffs claim that they had no "fair opportunity to litigate" the issue of whether the post-indictment issuance of the subpoena was an unconstitutional abuse of the grand jury because they could not argue this point in the New York Court of Appeals.

But plaintiffs had their opportunity before Justice Balbach. It is true that the issue could not be raised in the New York Court of Appeals, but that was by plaintiffs' own design. Having asserted the matter before Justice Balbach, plaintiffs could have appealed his adverse order to the Appellate Division and argued it again. Instead, plaintiffs elected to appeal directly to the New York Court of Appeals, and they were then limited to questioning "the validity of a statutory provision of the state." N.Y. Civil Practice Law and Rules §5601(b)(2). An issue decided by a

court is not less conclusive because unappealable. *Winters v. Lavine,* at 6509, and cases cited.

Under the circumstances plaintiffs may not raise the issues set forth in their complaint.[3]

B. *Abstention*

Even if plaintiffs were not foreclosed by the determination in the state courts, this court would abstain from interfering with the pending state proceedings.

Defendant has moved in state court to enforce compliance with the subpoena. Plaintiffs seek to enjoin the defendant from pursuing that proceeding. While 28 U.S.C. §2283 does not bar the relief sought (*Mitchum v. Foster,* 407 U.S. 225 1972)), the notions of federalism and comity announced in *Younger v. Harris,* 401 U.S. 37 (1971) and extended in *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975), *Juidice v. Vail,* 430 U.S. 327 (1977), and *Trainor v. Hernandez,* 431 U.S. 434 (1977) require that this court stay its hand where plaintiffs may raise the identical arguments in the state proceeding.

As the three cases last cited demonstrate, the doctrine developed in the *Younger* decision applies to non-criminal as well as criminal proceedings. Here, as in those cases, the state is acting in state court to vindicate important state policies: an investigation into well-documented abuses by nursing home operators. Respect for the processes of the state's judicial system (i.e. a grand jury subpoena) therefore requires that this court defer to that proceeding where plaintiffs may make the contentions made here.[4]

Since the issues set forth in plaintiffs' complaint have been decided conclusively against them in the state court, the plaintiffs' motion is denied, and the complaint will be dismissed unless within twenty days of the date of this

order plaintiffs show cause why the complaint should not be dismissed. So ordered.

Dated: Brooklyn, New York
June 15, 1978

s/Eugene H. Nickerson
EUGENE H. NICKERSON, U.S.D.J.

The Clerk shall make copies of this Memorandum and Order and serve them upon the parties.

NOTES

1. In the *Winters* case, the state had also denied a claim for Medicaid reimbursement for "practitioner" services. A state proceeding challenging that determination was still pending when the Second Circuit decided the federal case, which covered both "nursing" and "practitioner" services. The Second Circuit held that the abstention doctrine developed in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (s1941) applied to the claim relating to the practitioners and that a federal court should await resolution of the state proceeding before reaching that claim. *Winters v. Lavine, supra,* at 6522-30.

Plaintiffs here have seized upon the Second Circuit's discussion of abstention and distinguished the "practitioner" claims there from the present case on the ground that they have "exhausted [their] state remedies and the constitutional and federal issues still remain." The distinction does not, however, apply to Ms. Winters' "nursing" claim, which was fully litigated through the state courts. The Second Circuit discussion of *res judicata* and collateral estoppel related exclusively to that claim.

2. Plaintiffs allege 28 U.S.C. §1343 as the basis for jurisdiction in this court. This case is, then, for these purposes, a civil rights case.

3. Plaintiffs cite *Cunningham v. Bronx Democratic Executive Committee,* 420 F. Supp. 1004 (S.D.N.Y. 1976) (3-judge U.S. 801 (1977). There plaintiff had unsuccessfully argued in the state courts the issues he urged in the federal court. The conclusive effect of the state determination was not raised by the parties or the courts. Both opinions are silent on the point and therefore do not constitute authority contrary to the *Winters* case.

4. The fact that defendant may argue in the pending state proceeding that plaintiffs are precluded by Justice Balbach's order does not disable them from raising again the points asserted in this court.

STATE SUPREME COURT ORDER PURSUANT TO CPL 610.25 POST COURT OF APPEALS DECISION MADE JUNE 20, 1978

At a Trial Term, Part 6 of the Supreme Court of the State of New York, held in and for the County of Queens, at the Courthouse thereof, located at 125-01 Queens Boulevard, Kew Gardens, New York on the 20th day of June, 1978.

Index No. S.P. No. 3763

PRESENT:
HON. GEORGE J. BALBACH

In the Matter of the Application of
FAR ROCKAWAY NURSING HOME and
LASZLO SZANTO,

Petitioners,

-against-

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Respondent

The respondent having, on August 1, 1977, issued a grand jury subpoena *duces tecum* commanding the production of certain enumerated books and records of petitioner FAR ROCKAWAY NURSING HOME for the period January 1, 1970 through December 31, 1976;

And the said subpoena *duces tecum* having, on

August 15, 1977, been personally served upon petitioner LASZLO SZANTO, a partner in petitioner FAR ROCKAWAY NURSING HOME;

And petitioners having, via this Special Proceeding moved to quash the said subpoena and declare Criminal Procedure Law section 610.25 unconstitutional;

And this Court having, by order dated and entered December 16, 1977, denied petitioners' motion to quash, sustained the constitutionality of Criminal Procedure Law section 610.25, commanded petitioners to bring the subpoenaed records to Court, and ordered a hearing pursuant to CPL §610.25 to determine the length of time said records might reasonably be held by respondent on behalf of the Grand Jury, and the conditions under which such records might be retained;

And the New York State Court of Appeals having, by order and decision dated May 4, 1978, affirmed the December 16, 1977 order of this Court, upheld the constitutionality of Criminal Procedure Law section 610.25, and remitted the proceedings to this Court;

And this Court having, by order dated January 20, 1978, required petitioners to deliver to the custody of the Supreme Court, Queens County, all of the books and records subpoenaed by respondent in the said grand jury subpoena *duces tecum* dated August 1, 1977;

And this Court having, by the said order of January 20, 1978, required the aforementioned records to remain in the custody of the Clerk of the Court until such further order of this Court;

And the petitioners having, pursuant to this Court's orders, delivered certain of the subpoenaed books and records to the Clerk of the Court;

And the Clerk having, pursuant to this Court's order, retained custody of those books and records delivered by petitioners;

And this Court having, on June 8, 1978, conducted a

hearing pursuant to CPL §610.25 and this Court's order of December 16, 1977;

And this Court having, on June 8, 1978, taken sworn testimony and heard oral argument, George Meissner, Esq. on behalf of the petitioners, and Special Assistant Attorney General Robert Dublirer on behalf of respondent;

NOW, based upon the foregoing and all other papers and proceedings had and filed herein, it is hereby

ORDERED that the Clerk of the Supreme Court, Queens County, release to respondent Deputy Attorney General and his representatives all of petitioners' books and records which are now in possession of the Clerk on and after July 5th, 1978; and it is further

ORDERED that petitioner LASZLO SZANTO comply with the subpoena *duces tecum* dated August 1, 1977, by delivering to the Grand Jury of Queens County on the next adjourned date of the said grand jury subpoena *duces tecum* all subpoenaed books and records not delivered to the Court if any, pursuant to this Court's prior orders; and it is further

ORDERED that respondent may retain possession of all subpoenaed books and records, on behalf of the Grand Jury, Queens County, until October 4th, 1978, with the following limitations:

(1) Immediately upon obtaining possession of petitioners' Accounts Payable Subsidiary Ledger cards and Accounts Receivable Subsidiary Ledger cards, respondent must photocopy them and return the originals to petitioners;

(2) Respondent must make available for viewing by petitioners and their representatives the original of any document retained pursuant to this order, within two business days of the receipt of any such request. Such viewing is to take place at respondent's offices, 270 Broadway, New York, New York, during normal business hours; and

(3) Within two business days of any reasonable request by petitioners, respondent must photocopy the original of any document retained pursuant to this order, and mail the photocopy to petitioners or their representatives;

and it is further

ORDERED that on October 4th, 1978 or prior thereto, respondent may, on good cause shown and upon due notice to petitioners, make request of this Court for continued possession of any document obtained pursuant to this order.

ENTERED:
s/George J. Balbach
J.S.C.

APPENDIX B

ORDER APPEALED FROM

In the Matter of CHARLES J. HYNES, as Deputy Attorney-General for Health, Social Services and Nursing Homes, Respondent v. ROLAND LERNER, Appellant.

Argued March 29, 1978; decided May 4, 1978

OPINION OF THE COURT

JASEN, J.

On October 28, 1976, appellant Roland Lerner, a partner in Park View Nursing Home, was served with a Bronx County Grand Jury subpoena duces tecum requiring him to produce essentially all the home's business records for 1970 "to the present".

In a motion to quash the subpoena, made on November 2, 1976, appellant alleged that the subpoena was unduly broad, and that since appellant was the target of a Grand Jury investigation, the subpoena violated his constitutional privilege against self incrimination. The motion was orally denied at Supreme Court, Bronx County, on November 5, 1976, and a formal order of denial was entered on December 10, 1976.

In the meantime, on November 8, 1976, a 25-count indictment against appellant was returned by the Bronx County Grand Jury, charging him with willful violation of the Public Health Laws and conspiracy in the fourth degree. All these charges arose out of a kickback scheme in which appellant had allegedly engaged.

For the second time appellant moved to quash the subpoena on December 21, 1976, now alleging that the dominant purpose of the subpoena was to acquire evidence in preparation for trial of the pending charges. Appellant also argued that the subpoena should be quashed because the materials which

it sought would provide information to which the Special Prosecutor already had access. Opposing the motion to quash, and cross-moving to have appellant held in contempt, the Special Prosecutor submitted a sworn affirmation advising the court that the subpoena sought information relating to an investigation of criminal activities other than those contained in the indictment.

On January 20, 1977, Supreme Court, Bronx County, heard oral argument on these motions. To preserve the confidentiality of the Grand Jury proceedings, the court heard an *in camera* oral statement of the Special Prosecutor out of the presence of opposing counsel. Based on the affirmation and oral statement, the court found that the dominant purpose of the subpoena was to investigate criminal activities other than those alleged in the indictment. The motion to quash was, therefore, denied and appellant was ordered to "produce and leave" all the subpoenaed records with the Grand Jury. The Appellate Division unanimously affirmed.

On this appeal, appellant's principal contention is that "the court below erred when it based its findings as to the dominant purpose behind the Grand Jury's post-indictment investigation solely upon verbal representations made by the prosecutor" without requiring production of the Grand Jury minutes.

[1, 2] Preliminarily, it should be stated that once an indictment is issued, a Grand Jury subpoena duces tecum may not be used for the sole or dominant purpose of preparing the pending indictment for trial. Such abuse was specifically disapproved in *United States v Dardi* (330 F2d 316, 336, cert den 379 US 845) and constitutes a misuse of the Grand Jury process. However, where the purpose of the Grand Jury investigation is directed to other offenses, its scope should not be circumscribed and any collateral or incidental evidence from bona fide inquiries may be used by the prosecutor against the defendant at the trial of the pending indictment.

Appellant, not disputing that the "dominant purpose" rule should be applied in this case to test the validity of the Grand Jury subpoena duces tecum, argues that the evidence offered by the Special Prosecutor at Supreme Court was insufficient as a matter of law to support a finding that the dominant purpose of the subpoena was to obtain information relevant to offenses not contained in the indictment. We cannot agree.

The record adequately supports the finding of the court

below. At the hearing on the motion to quash the subpoena, the Special Prosecutor submitted a sworn affirmation in which he asserted that "[t]he Grand Jury * * * is continuing its investigation into whether or not additional crimes have been committed. These additional crimes include, but are not necessarily limited to, Grand Larceny, Offering a False Instrument for Filing, and Falsifying Business Records. Thus, the records sought are required to obtain evidence for different crimes than contained in the said indictment." In addition, the Special Prosecutor was examined by the court *in camera*. This examination confirms the affirmation submitted and reveals in greater detail that a legitimate Grand Jury investigation was being conducted in connection with offenses not contained in the indictment. Therefore, we agree that the dominant purpose of the challenged subpoena duces tecum was directed to other offenses than those contained in the indictment.

[3, 4] Contrary to appellant's contention, the court below was not required to inspect the Grand Jury minutes before rendering its decision, but was justified in relying on the written and oral representations made by the Special Prosecutor. (*Matter of Grand Jury Proceedings*, 507 F2d 963, 966.) His statements were not limited to vague generalities, but detailed specific allegations of wrongdoing and reasons why the records sought would be relevant to a legitimate Grand Jury investigation. Although the court, in its discretion, might have required the Special Prosecutor to produce the Grand Jury minutes, it was not error, as a matter of law, to rely upon the affirmation and *in camera* oral statement. Moreover, it was not improper for the court to conduct the hearing *in camera*. Since Grand Jury proceedings are secret (CPL 190.25, subd 4), the *in camera* hearing was an acceptable means for the court to become apprised of the purposes of the subpoena, while preserving the secrecy of the Grand Jury proceedings.

Appellant also argues that the subpoena seeks documents containing information available to the Grand Jury, and that the subpoena is overbroad. The factual showing made by the Special Prosecutor belies both these contentions. At the *in camera* hearing, the Special Prosecutor explained in detail the need for the subpoenaed materials in connection with investigating uncharged criminal offenses. Having established the relevancy of these documents to a legitimate Grand Jury investigation, the Special Prosecutor has the right to retain

and inspect them for a reasonable period of time. (CPL 610.25; *Matter of Hynes v Moskowitz*, 44 NY2d —.)

[5] Finally, appellant seeks modification of the order of Supreme Court, Bronx County, which required that he "leave" the subpoenaed records with the Grand Jury. Appellant argues that prior to the enactment of CPL 610.25, effective July 19, 1977, retention of materials obtained by a Grand Jury subpoena duces tecum was forbidden. (*Matter of Heisler v Hynes*, 42 NY2d 250; cf. *Matter of Windsor Park Nursing Home v Hynes*, 42 NY2d 243.) Since the challenged subpoena was issued prior to July 19, 1977, appellant contends that CPL 610.25 may not be applied to permit retention of the subpoenaed materials.

In raising this argument, appellant does not challenge the power of the Grand Jury to issue subpoenas, for long before the enactment of CPL 610.25 the Grand Jury had such power. (CPL 190.50, subd 3.) This power was extended by CPL 610.25 only insofar as retention of the subpoenaed material is concerned. Thus, the issue concerns the mode of compliance with a subpoena—that is, whether retention may be ordered. Since appellant has not yet complied with the subpoena, and the Grand Jury has not yet gained possession of the materials sought, it would make little sense to apply the law prior to July 19, 1977. The validity of the legal process itself not being at issue, the mode of compliance should conform to present law.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

Order affirmed.

NOTICE OF APPEAL

Index No. 2997/76
Indictment No. 2543/76

COURT OF APPEALS
STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION OF
CHARLES J. HYNES, Deputy Attorney General
of the State of New York,
For an Order Adjudging
ROLAND LERNER,

Appellant,

Guilty of Contempt of Court.

PLEASE TAKE NOTICE, that ROLAND LERNER, appellant above named, hereby appeals to the United States Supreme Court from the judgment rendered by the Court of Appeals, State of New York, entered in this action on the 4th day of May, 1978. This appeal is taken pursuant to Title 28, of the United States Code, §1257(2), from a judgment affirming the validity of New York CPLR 2305 and CPL 610.25.

Dated: Brooklyn, New York
June 23, 1978

GEORGE S. MEISSNER
Attorney for Appellant
Office & P.O. Address
16 Court Street
Brooklyn, New York 11241
(212) 596-2596

TO: CHARLES J. HYNES
Deputy Attorney General
270 Broadway
New York, New York 10007

CLERK OF THE COURT: COURT OF APPEALS
OF THE STATE OF NEW YORK
Eagle Street
Albany, New York 12207

NOTICE OF APPEAL TO SUPREME COURT IN LERNER V. HYNES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

IN THE MATTER OF THE APPLICATION OF CHARLES J. HYNES, Deputy Attorney General of the State of New York,

For an Order Adjudging
ROLAND LERNER,

Appellant,

Guilty of Contempt of Court.

NOTICE OF APPEAL
Index No.: 2997/76
Indictment No.: 2543/76

PLEASE TAKE NOTICE, that ROLAND LERNER, appellant above named, hereby appeals to the United States Supreme Court, from the judgment rendered by the Court of Appeals, State of New York, entered in this action on the 4th day of May 1978. This appeal is taken pursuant to Title 28, of the United States Code, §1257(2), from a judgment affirming the validity of New York CPLR 2305 and CPL 610.25.

Dated: Brooklyn, New York
June 23, 1978

GEORGE S. MEISSNER
Attorney for Appellant
Office & P.O. Address
16 Court Street
Brooklyn, New York 11241
(212) 596-2596

TO:
CHARLES J. HYNES
Deputy Attorney General
270 Broadway
New York, New York 10007

CLERK OF THE COURT: BRONX COUNTY
851 Grand Concourse
Bronx, New York 10451

ORDER DATED JANUARY 25th, 1977

Index Number 2997/76

At a Criminal Term, Part 28 of the Supreme Court of the State of New York, held in and for the County of Bronx at 851 Grand Concourse, Bronx, New York on the 25th day of January 1977.

PRESENT:
HONORABLE LAWRENCE J. TONETTI

IN THE MATTER OF THE APPLICATION OF
CHARLES J. HYNES, Deputy Attorney General
for Health, Social Services
and Nursing Homes,

Petitioner,

For an Order Adjudging
ROLAND LERNER,

Respondent,

Guilty of Contempt of Court.

The petitioner, CHARLES J. HYNES, having duly moved by an order to show cause dated December 29, 1976 for an Order adjudging ROLAND LERNER guilty of contempt of Court for failure to comply with a Grand Jury Subpoena *Duces Tecum* dated October 26, 1976 and for failure to comply with an order of Justice Lawrence J.

Tonetti entered December 10, 1976, and such motion having come to be heard and

Upon reading and filing the affirmation of Frank J. Marine dated December 29, 1976 in support of petitioner's motion and upon reading and filing the affirmation of George S. Meissner dated January 17, 1977 in opposition petitioner's motion, and,

The respondent, Roland Lerner, having moved by an Order to Show Cause dated December 21, 1976 for an order quashing said subpoena *duces tecum* and sealing the Deputy Attorney General's files and such motion having come to be heard, and

Upon reading and filing the affirmation of George S. Meissner dated December 21, 1976, the reply affirmation of George S. Meissner dated December 21, 1976, the reply affirmation of George S. Meissner dated January 7, 1977, and Mr. Meissner's memorandum of law, in support of Roland Lerner's motion to quash, and upon reading and filing the affirmation of Frank J. Marine dated December 27, 1976 and letter dated January 11, 1977 in opposition to Roland Lerner's motion, and

Having heard oral argument on both motions on January 20, 1977, and

Having heard an *in camera* presentment by Frank J. Marine on January 20, 1977,

NOW, upon motion of Frank J. Marine, it is

ORDERED, that Roland Lerner's motion to quash the aforementioned subpoena duces tecum and to seal the Deputy Attorney General's evidentiary files is denied in all respects; and it is further

ORDERED, that ROLAND LERNER produce and leave all the books and records subpoenaed by the said subpoena *duces tecum* before the Bronx Grand Jury on the sixth floor at 851 Grand Concourse, Bronx, New York on January 28, 1977 at 10:00 A.M.

ENTER,

s/Lawrence J. Tonetti
LAWRENCE J. TONETTI
Justice of the Supreme Court

Dated: January 25, 1977

Motion to Quash or Modify a Subpoena Duces Tecum

PRESENT:
HON. GEORGE J. BALBACH, Justice.

In the Matter of the Application of
FAR ROCKAWAY NURSING HOME and
LASZLO SZANTO.

Petitioners,

-against-

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Respondent.

The following papers numbered 1 to 4 submitted in this motion on September 15, 1977.

Notice of Motion and Affidavits Annexed, papers numbered 1-2.

Minutes, Petitioner's Memorandum of Law, papers numbered 3.

Other, Respondent's Memorandum of Law, papers numbered 4.

Upon the foregoing papers, and in the opinion of the Court herein, petitioner's motion to quash is denied. However, the request for alternate relief is granted to the extent that a hearing will be held on January 6, 1978 at 10:00 A.M., in accordance with the opinion of this date.

Dated: December 16, 1977

George J. Balbach, J.S.C.

MEMORANDUM DECISION DATED 12/16/77

BY GEORGE J. BALBACH, J.
DATED December 16, 1977

Ind. No. SP No. 3763

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART 6

In the Matter of the Application of
THE PEOPLE OF THE STATE OF NEW YORK
FAR ROCKAWAY NURSING HOME and
LASZLO SZANTO,

Petitioners,

-against-

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Respondent.

Petitioner moves to quash a Grand Jury subpoena duces tecum or in the alternative, restrict its use. Respondent cross-moves for an order compelling compliance with the subpoena.

The petitioner, a partner in the Far Rockaway Nursing Home, was served by the nursing home Deputy Attorney General, Charles Hynes, with a Grand Jury subpoena duces tecum on August 15, 1977. This subpoena sought books and records pertaining to the operation of

the home for a period ranging from January 1, 1970 to December 31, 1976.

The validity of the subpoena is now challenged. It is contended: (1) that petitioner has already been indicted on nursing home violations and hence this new action constitutes an abuse of the Grand Jury's powers; (2) that the subpoena is overbroad in its demands and technically deficient in other respects; and (3) that the recent subpoena laws utilized by the special prosecutor are unconstitutional.

Before considering petitioner's claim for relief, it is necessary to trace the tangled history of litigation in this case. Briefly, on October 19, 1976 a Grand Jury subpoena, addressed to the Far Rockaway Nursing Home, was served on Laszlo Szanto, the present petitioner. This subpoena demanded 17 different business records and documents for the period of January 1, 1970 to December 31, 1976. A motion was immediately made to quash and Mr. Justice William Brennan denied such relief on November 5, 1976. Thereafter, Mr. Szanto was indicted on November 12, 1976 and charged with one count of conspiracy in the fourth degree and 14 counts of violating the public health laws.

On December 2, 1976 petitioner appeared outside the Grand Jury room in answer to the earlier subpoena but did not appear before the Grand Jury or produce his records. His appearance at that time was allegedly adjourned to a later date. Thereafter, the Special Prosecutor sought to have petitioner come before another Grand Jury but he refused maintaining that his first appearance constituted full compliance with the terms of the subpoena.

On March 31, 1977 the respondent moved to hold the petitioner in contempt of court for his failure to comply with the October subpoena. By a decision, dated May 26, 1977, Mr. Justice Thomas Agresta ordered the petitioner to appear before a Grand Jury on June 7, 1977 and held

the contempt proceedings in abeyance. The order of Mr. Justice Agresta was immediately appealed to the Appellate Division. Soon thereafter the Special Prosecutor petitioned Mr. Justice Agresta to vacate his earlier order and this was done on June 17, 1977.

The present subpoena was served on August 15th of this year and requested the same 17 documents. In addition, it was requested that petitioner bring them u to date, from January 1, 1970 to December 31, 1976. This then constitutes the background of the present motion.

Petitioner's first contention is that the subpoena should be quashed in that the Special Prosecutor is using the Grand Jury to secure additional evidence for the purpose of prosecuting the pending indictment. A recent case in point is *Hynes v. Lerner,* 57 AD 2d 752, in which the defendant was similarly indicted for nursing home violations. A subpoena was there issued after the Grand Jury returned the indictment and a similar claim of "post indictment" evidence seeking was raised. The Appellate Division, First Department, rejected this claim of subpoena abuse saying:

> "However, the subpoena is directed toward other possible violations of the criminal law.
>
> As was recently stated by Mr. Justice Joseph Jaspan:
>
> 'After a defendant has been indicted, a proscutor may not use a grand jury for the purpose of securing additional information or freezing testimony in and of the prospective trial (cites omitted) *but a good faith inquiry into other charges within the scope of the prosecutor's authority is not prohibited even if it were to incidentally produce some additional evidence in the pending case.*' " *Id.* at 752 (emphasis added).

The above hlding was also reached in *People v. Donauty,* 97 Misc 2d 797. In essence, a prosecutor is barred from utilizing a Grand Jury subpoena for the purposes

of reopening a completed indictment. Once the Grand Jury returns its findings on particular crimes, it has terminated its power as to those crimes. In the instant case the present indictment simply terminated the Grand Jury investigatory powers as to the count of conspiracy and the violations of the public health laws. Such an indictment does not automatically close all other investigations which a special prosecutor in good faith may seek to pursue provided the same are within the scope of his authority. Therefore since the nursing home prosecutor is utilizing the present subpoena to investigate other charges than the ones respondent is presently accused of, he has not abused the Grand Jury power. Nor, as petitioner further contends is this subpoena simply a reopening of the first subpoena. The record indicates that Mr. Justice Thomas Agresta vacated his order requiring petitioner to appear before the Grand Jury on June 7, 1977. Hence there is nothing pending before the courts in connection with the prior subpoena.

The second attack on the validity of the subpoena alleges that the demand is overbroad. A review of the requested documents furnishes no support for this contention. The function of a Grand Jury is to investigate. In the case at bar the Grand Jury seeks only the normal and basic records of a nursing home institution. Such records have been demanded in prior cases and found reasonable in scope by the courts (see *Lewis v. Hynes,* 82 Misc 2d 256). The general rule in quashing a Grand Jury subpoena is that said application will be granted only if "the records are so unrelated to the subject of inquiry as to make it obvious that their productions would be futile" for the purpose of the Grand Jury's investigation (*Matter of Manning v. Valente,* 272 App Div 358, 361 affd 297 NY 681).

Petitioner, in this area, also challenges the constitutionality of the subpoena in that he alleges that it violates Section 190.40 of the Criminal Procedure Law and Section

2305 of the C.P.L.R. This violation stems from the fact that he was obliged toproduce books under the power of the subpoena without receiving immunity. However, since a nursing home operator does not possess a Fifth Amendment privilege as regards books and records of a nursing home (Sigerty v. Hynes, supra), the Court finds no basis for extending immunity and, hence, no legal merit to the challenge under Section 190.40 of the Criminal Procedure Law or Section 2305 of the C.P.L.R.

This brings us to the third issue—the question of the constitutionality of the present subpoena. The special prosecutor, mindful of the objections raised in the "Heisler" case, moves not only to present these documents to the Grand Jury, but also to permit that body to retain the records for as long as they reasonably need them and further to permit the Attorney General to assist the Grand Jury in its deliberations with these documents. In effect the respondent is utilizing the entirely new Section 610.25 of the Criminal Procedure Law and the amended Section 190.25 (4) of the same Criminal Procedure Law. Since these are the only sections directly before the court, the court will only consider the validity of these sections and no others. The petitioner in this case maintains that the demand of the Attorney General to retain in the name of the Grand Jury his records for a reasonable period of time constitutes "unlawful search and seizure" and violates rights guaranteed by the Constitution.

In considering this argument this court notes that the statutory definition of a subpoena duces tecum (Criminal Procedure Law, Section 610.10) is simply one which requires "the witness to bring with him and produce specified physical evidence." Traditionally then, a subpoena duces tecum involves the act of merely producing records for temporary use and our courts have never equated this act with unlawful search and seizure within the meaning of the Fourth Amendment. As was pointed

out in *United States v.Dionisio,* 410 US 1, "it is clear that a subpoena to appear before a Grand Jury is not a 'seizure' in the Fourth Amendment sense, even though the summons may be inconvenient or burdensome." (410 US 1, 9). In distinguishing between these two forms of legal process, the court noted as follows: "The compulsion exerted by a Grand Jury subpoena differs from the seizure affected by an arrest or an even investigative 'stop' in more than civic obligations. For, as Judge Friendly wrote for the Court of Appeals for the Second Circuit:

> 'The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.' " *United States v. Doe* (Schwartz), 457 F. 2d, at 898.

United States v. Dionisio, supra at 10. See also, *United States v. Mara,* 410 U.S. 19 (1973).

However, in considering the new statutes we are dealing with retention subpoenas which extend the traditiona borders of such mandates by granting the issuing party the right to retain possession of records for a reasonable length of time. Does this additional control violate constitutional standards? Clerly, the right to temporary possession of records falls far short of impoundment, yet it does to some extent infringe upon the right of ownership. The Fourteenth Amendment states that no state shall "deprive a person of life, liberty or property without due process of law." This has ben held to include documents secured under a subpoena (*In re Atlas Lathing Corp.,* 176 Misc 959). Since "the constitutional guarantee of procedural due process attaches when there is a government

deprivation of a legitimate property interest" (*Matter of Sanford v. Rockefeller,* 35 NY 2d 547, 567, it would appear that if there are constitutional issues in these statutes, such questions would fall under the due process clause of the Fourteenth Amendment rather than the search and seizure area of the Fourth Amendment.

Petitioner contends that these statutes are unconstitutional on their face. In considering due process, the test to be applied is that the law "be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil" (*Matter of Toie v. Regen,* 54 AD 2d 46, 55 affd. 40 NY 2d 837). Thus the issues to be resolved in considering constitutionality are twofold:

> (1) Is the right of retention a reasonable exercise of the states power?
>
> (2) Does the statute clearly seek to remedy some actual and manifest evil?

As regards the reasonableness of the enactment, it would appear clear that the amount of records required to run a modern business, both for internal and legal needs, have grown in recent years. In light of this unavoidable increase in records, it would not appear unreasonable to permit a Grand Jury (and those delegated by law to assist a Grand Jury), the right to view such material for a longer period of time than in years past. Nor would it appear unreasonable to deny the Grand Jury the right to have trained personnel to explain the value of such documentation. Simply put, a modern Grand Jury in order to function properly in a complex society must have more than mere access to subpoenaed documents; it must have the time necessary to study, understand and evaluate them. In this connection the court is mindful of the views expressed by Mr. Justice Jasen in *Matter of Heisler v. Hynes,* 42 NY 2d 250, 257.

> "It follows that the Grand Jury may compel the attendance of a witness for as long as is reasonably necessary for legitimate investigatory purposes. Likewise, it must logically be concluded that property, produced in accordance with a judicial subpoena duces tecum, may also be at the disposal of the Grand Jury for a reasonable period sufficient to permit orderly and intelligent evaluation and assessment. This is a matter of common sense. * * *"

Therefore, the court concludes that the purpose of the subpoena statutes in permitting retention of documents for a reasonable length of time and under reasonable circumstances is not arbitrary, but based upon rational premises.

In dealing with the second requirement, it is equally clear that the goal of the legislature is to facilitate the power of the Grand Jury to conduct a proper investigation. The current state of law is conducive to delay and uncertainty in that it sets no time limit on the Grand Jury's right to retain and examine documents nor specifies the conditions that it might examine same. This uncertainty is the evil that new Sections 610.25 and 190.25(4) of the Criminal Procedure Law are seeking to remedy. This purpose would appear to be a proper basis in which to exercise the police powers of the state.

However, the right of due process "requires notice and an opportunity to be heard" (*Matter of Sanford v. Rockefeller,* supra, 567). Wherefore, it is this court's view that the statutes must be interpreted so as to grand the petitioner an absolute right to have the court evaluate what is reasonable regarding the retention of his property. To permit the special prosecutor to arbitrarily determine the length of time that the Grand Jury may retain records would deny the respondent due process of law. All parties in this action have their rights. Respondent has the right and obligation to present the evidence of the subpoenaed material before the Grand Jury; petitioner has the right to

know how long his property will be taken from him and when he may expect it to be returned. In this way, all parties may make a good faith effort to mitigate the harm done by taking away one's business or personal records. The court must, therefore, "strike a proper balance between a Grand Jury's right to 'temporary use of the books' and the right of the party whose records are involved to protection "against harmfully affecting his affairs" (*Matter of Meisler,* supra, p. 254).

This application is granted to the extent that the petitioners will produce their records in accordance with the subpoena in this court on Friday, January 6, 1978, at 10:00 A.M., and a hearing will be conducted then to determine the length of time said records may reasonably be held and the conditions under which such records may be retained pursuant to the criteria set down in the Criminal Procedure Law, Section 610.25 (2).

Order entered accordingly.

The clerk of the Court is directed to mail a copy of this decision and the order to be entered thereon to the attorney for the petitioner and the respondent.

George J. Balbach, J.S.C.

STATE SUPREME COURT ORDER
PURSUANT TO CPL 610.25
POST COURT OF APPEALS DECISION

Ind. No. 2543/76

SUPREME COURT: BRONX COUNTY
TRIAL TERM: PART XXVIII

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ROLAND LERNER and
PARK VIEW NURSING HOME,

Defendants.

TONETTI, J.:

This nursing home case involves compliance with a subpoena duces tecum for the books and records of the defendant issued by the Special Prosecutor's office on October 26, 1976. Between the date of issuance and the present, the defendants have moved to quash the subpoena in this court, the Appellate Division and the Court of Appeals without success. While these appeals have determined with finality the validity of the Special Prosecutor's right to subpoena the documents in question, in the interim, a new problem has arisen mandating a determination by this court. In Matter of Heisler v. Hynes, 42 N Y 2d 250, the Court of Appeals held that while the Grand Jury or the Special Prosecutor may subpoena the documents in question, there was no legal authority for

retention of said documents. Immediately, thereafter, the Legislature enacted C.P.L. Section 610.25, which provides as follows:

"1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.

2. The possession shall be for a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms and conditions shall be determined with consideration for among other things, (a) the good caused shown by the party issuing the subpoena, or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident threto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interests of justice."

While this statute was enacted subsequent to the issuance of the subpoena, the Court of Appeals in its decision on this very cse, specifically stated that subsequent rulings in this case were to be made in conformity with the provisions of the new statute (In the Matter of Hynes v. Lerner, N Y 2d slip opinion, no. 197, Dated May 4, 1978). Thus, this court, mindful of the new statute, the Court of Appeals rulings in Matter of Hynes v. Moskowitz, et al, N Y 2d slip opinion numbers 198, 216, 217, dated May 4, 1978, and the First Department ruling in Matter of Hynes v. Lefkowitz, N.Y.L.J., 6/5/78 p. 1, held a hearing to determine the reasonableness of the retention of the documents subpoenaed.

This Court having heard the arguments of both sides,

and having taken testimony under oath concerning the reasonableness of the possession and taking into consideration the time, terms and conditions of the prosecutor's possession of the books and records makes the following findings of fact and orders compliance in the following manner.

The burden was placed on the Special Prosecutor to establish the reasonableness of the retention. To meet this burden the prosecutor stated that his office was involved in an ongoing investigation of Park View Nursing Home and defendant Lerner to ascertain if there was an abuse of the medicaid system. He explained that it was necessary for his office to retain possession of the records for a period of six months in order to have their accountants thoroughly research the available evidence. It would be impossible to take partial possession at varying times because of the constant necessity of cross-referencing entries through the various journals to verify their accuracy. Further, the sheer volume of the material subpoenaed would create an unreasonable burden on the Special Prosecutor with regard to photocopying all the material. It should also be noted that the Special Prosecutor requested an extension of the time parameters of the material being surrendered. The original subpoena commanded production of books and records from January 1, 1970 to the present, which would then be the date of issuance or October 26, 1976. At the hearing he asked for an order extending this period to December 31, 1977 on authority of Matter of Hynes v. Lefkowitz — A.D.2d — N.Y.L.J. 6/6/78 p. 1.

The defendant was next asked to make a showing of his legitimate needs for the subpoenaed documents. He did this through the statements of his attorney and the sworn testimony of his accountant. Two clear facts emerged from this presentation. Firstly, with regard to items denominated accounts payable subsidiary ledger and

amounts receivable subsidiary ledger, enumerated items 8 and 9 on the subpoena, the defendant has a legitimate need to make daily entries on these records in order to efficiently run his business. Secondly, with regard to the other material the accountant testified that he needed to make occasional reference to these materials to prepare the accounts of the home. As a general rule, his testimony indicated that the more remote in time from the present the less likelihood of his needing them. He pointedly stated that the 1977 records were still frequently used.

Thus, this Court in balancing the needs of the Special Prosecutor and the defendant orders compliance in the following fashion:

1. All materials subpoenaed *except* the accounts payable subsidiary ledger and the accounts receivable subsidiary ledger, for the period commencing January 1, 1970 and ending December 31, *1976* shall be turned over to the Special Prosecutor within one month of the issuance of this order to be retained by the Prosecutor or Grand Jury until December 31, 1978, except those used as exhibits before theGrand Jury. With regard to the 1977 records the Court finds the prosecutor has shown insufficient need to offset the defendant's legitimate interest in retaining these records.

2. The accounts payable subsidiary ledger and the accounts receivable subsidiary ledger are to be surrendered to the Special Prosecutor for aperiod of 48 hours during which time he is to make copies for his purposes and return the originals.

3. The Special Prosecutor is directed to make available for inspection, immediately upon request of Roland Lerner or any representative of the Park View Nursing Home any original document retained pursuant to this order and to return a photocopy of an item needed for the operation of the home.

4. Compliance with this order means surrendering the

subpoenaed material to a representative of the Special Prosecutor at the Park View Nursing Home and any book and record thus surrendered shall be deemed to have been produced before the Grand Jury of Bronx County.

5. The special Prosecutor shall be responsible for the costs of transportation and copying of all records.

Finally, the Prosecutor's application for a contempt citation is held in abeyance pending compliance with this order.

This decision constitutes the order of the Court.

Dated: June 7, 1978

LAWRENCE J. TONETTI
J.S.C.

NOTICE OF APPEAL
TO THE COURT OF APPEALS

Index No. 3763
Indictment No. 2515/76

COURT OF APPEALS OF
THE STATE OF NEW YORK

In the Matter of the Application of
FAR ROCKAWAY NURSING HOME and
LASZLO SZANTO, Partner,

Appellant,

For an Order Quashing Subpoenas issued by
CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Respondent.

PLEASE TAKE NOTICE, that FAR ROCKAWAY NURSING HOME and LASZLO SZANTO, petitioners above named, hereby appeal to the United States Supreme Court from the judgment rendered by Court of Appeals, State of New York, entered in this action on th 4th day of May 1978. This appeal is taken pursuant to Title 28, of the *United States Code,* §1257(2), from a judgment affirming the validity of New York CPLR 2305 and CPL 610.25.

Dated: Brooklyn, N.Y.
June 23, 1978

GEORGE S. MEISSNER
Attorney for Petitioners
Offcie & P.O. Address
16 Court Street
Brooklyn, New York 11241
(212) 596-2596

TO: CHARLES J. HYNES
Deputy Attorney General
270 Broadway
New York, New York 10007

CLERK OF THE COURT: COURT OF APPEALS
OF THE STATE OF NEW YORK
Eagle Street
Albany, New York 12207

NOTICE OF APPEAL
TO THE SUPREME COURT

Index No. 3763
Indictment No. 2515/76

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

In the Matter of the Application of
FAR ROCKAWAY NURSING HOME and
LASZLO SZANTO, Partner,

Appellant,

For an Order Quashing Subpoenas issued by
CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Respondent.

PLEASE TAKE NOTICE, that FAR ROCKAWAY NURSING HOME and LASZLO SZANTO, petitioners above named, hereby appeal to the United States Supreme Court from the judgment rendered by Court of Appeals, State of New York, entered in this action on th 4th day of May 1978. This appeal is taken pursuant to Title 28, of the United States Code, §1257(2), from a judgment affirming the validity of New York CPLR 2305 and CPL 610.25.

Dated: Brooklyn, N.Y.
June 23, 1978

GEORGE S. MEISSNER
Attorney for Petitioners
Offcie & P.O. Address
16 Court Street
Brooklyn, New York 11241
(212) 596-2596

TO: CHARLES J. HYNES
Deputy Attorney General
270 Broadway
New York, New York 10007

CLERK OF THE COURT: QUEENS COUNTY
88-11 Sutphin Boulevard
Jamaica, New York 11432
Albany, New York 12207

LETTER OF HON. MATTHEW J. JASEN DATED MAY 24, 1978

[Letterhead of State of New York, Court of Appeals, Erie County Hall, Buffalo, N.Y. 14202, Matthew J. Jasen, Judge].

May 24, 1978

T. James Bryan, Esq.
Counsel
Special Prosecutor for Nursing Homes
Health and Social Services
270 Broadway
New York, New York 10007

Re: Matter of Hynes v. Moskowitz, et al.
Nos. 198, 216, 217 (May 4, 1978)

Dear Mr. Bryan:

You are absolutely correct that the reference to Grand Jury subpoenas on page 9 of my uncorrected opinion in *Matter of Hynes v. Moskowitz, et al.* is inappropriate and it has been deleted.

The sentence now reads:

"We would also observe that the statutes do not affect the law as it existed prior to their enactment with respect to the obligation of a person served with a non-judicial subpoena duces tecum."

Thank you for calling my attention to this inadvertency.

Very truly yours,

s/ Matthew J. Jasen
MATTHEW J. JASEN

MJJ:fmw

pc:
Barry I. Slotnick, Esq.
Attorney for Moskowitz
233 Broadway
New York, New York 10007

George Meissner, Esq.
Attorney for Far Rockaway/Queens-Nassau
16 Court Street
Brooklyn, New York 11241

COURT OF APPEALS DECISION OF JUNE 8, 1978 DENYING REARGUMENT RE: LERNER V. HYNES

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June A.D. 1978

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

Mo. No. 609

In the Matter of the Application of Charles J. Hynes, Deputy Attorney General for Health, Social Services and Nursing Homes,

Respondent,

for an Order Adjudging Roland Lerner,

Appellant,

Guilty of Contempt of Court.

A motion for reargument &c. in the above cause having heretofore been made upon the part of the Appellant and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that said motion be and the same hereby is denied.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

Supreme Court of the United States

October Term, 1978

No. 78-276

In the Matter of

CHARLES J. HYNES, as Deputy Attorney General for Health, Social Services and Nursing Homes,

Respondent,

against

ROLAND LERNER,

Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

CHARLES J. HYNES
Deputy Attorney General
State of New York
270 Broadway
New York, New York 10007
(212) 488-5281

T. JAMES BRYAN
Special Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute:

Supreme Court of the United States

October Term, 1978

No. 78-276

In the Matter of

CHARLES J. HYNES, as Deputy Attorney General for Health, Social Services and Nursing Homes,

Respondent,

against

ROLAND LERNER,

Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

Statement

On May 4, 1978, the New York State Court of Appeals unanimously affirmed an order of the Appellate Division, First Department. *Matter of Hynes* v. *Lerner,* 44 N.Y.2d 329 (1975). The Appellate Division had unanimously affirmed an order of the Supreme Court, Bronx County, entered January 25, 1977, denying Roland Lerner's second motion to quash a grand jury subpoena duces tecum, which

had been issued on October 26, 1976. *Matter of Hynes* v. *Lerner*, 57 A.D.2d 752 (2d Dept. 1977). Lerner has filed a notice of appeal to appeal this decision to this Court. This brief is submitted in support of a motion to dismiss this appeal or, in the alternative, to affirm the decision of the Court of Appeals.

Introduction

[The history of a grand jury subpoena duces tecum issued on October 26, 1976, almost two full years ago.]

A grand jury subpoena is issued on October 26, 1976.

On October 26, 1976, a grand jury subpoena duces tecum was issued to Roland Lerner. This subpoena directed Mr. Lerner, the owner and operator of the Park View Nursing Home, to appear before a Bronx County Grand Jury investigating the operation of nursing homes in Bronx County on November 3, 1976 with certain books and records of the home.

Lerner challenges the subpoena in federal court.

Roland Lerner first challenged this subpoena by attacking the constitutionality of Section 190.40(2)(c) of the New York State Criminal Procedure Law in federal court. This statute provides that a witness appearing before a New York State grand jury who gives evidence receives automatic immunity if he had a Fifth Amendment privilege with respect to the giving of that evidence. Lerner argued that this statute was unconstitutional because it would not confer immunity upon him for producing his nursing home books and records since he had no Fifth Amendment privilege with respect to those books and records. Lerner asked Judge KNAPP of the District Court of the Southern District of New York to preliminarily enjoin enforcement of this grand jury subpoena and to convene a three-judge bench, pursuant to 28 U.S.C. §2281, to determine the constitutionality of Section 190.40(2)(c) of the Criminal Procedure Law. *Lerner & Park View Nursing Home* v. *Hynes*, 76 Civ. 4855 (WK). Judge KNAPP denied the motion for a preliminary injunction on November 1, 1976. Thereafter, Lerner withdrew his motion, without prejudice.

Lerner challenges the subpoena in state court.

Lerner next moved in the Supreme Court, Bronx County, for an order quashing this subpoena. A temporary stay of the subpoena was granted by the court pending consideration of this motion. *Matter of Lerner* v. *Hynes*. On November 4, 1976, after hearing argument from both sides, Justice TONETTI of the Bronx County Supreme Court orally denied this motion. On December 10, 1976, an order was entered denying this motion. This order directed Lerner to appear before the grand jury on December 15, 1976 with the subpoenaed records.

Although Lerner appeared before the grand jury on December 15, 1976, he did not produce the subpoenaed records, except for a few items.

A motion is made by the Deputy Attorney General to have Lerner held in contempt; he brings a second motion to quash the subpoena in response.

The Deputy Attorney General brought a motion to have Lerner cited for contempt. *Matter of Hynes* v. *Lerner*. Lerner cross-moved to have the subpoena quashed, arguing

that the subpoenaed materials were being sought for the improper purpose of enabling the Deputy Attorney General to prepare for the trial of an indictment filed against Lerner on November 8, 1976. This indictment charged Lerner with twenty-four counts of Wilful Violation of the Health Laws [Public Health Law §12-b(2)] for soliciting and receiving kickbacks from vendors to his nursing home and one count of Conspiracy in the Fourth Degree [Penal Law §105.00]. Bronx County Indictment No. 2543-76. In response to this motion, the Deputy Attorney General submitted an affirmation stating that the grand jury was continuing its investigation of Lerner to determine whether he had committed other crimes in addition to those already charged, such as Offering a False Instrument for Filing [Penal Law §175.35] or Larceny [Penal Law §§155.00 et seq.]. In addition, the Deputy Attorney General submitted an *in camera* affirmation to the court detailing the evidence before the grand jury which supported the bona fides of its investigation into these other crimes.

Lerner is again ordered by the court to comply with the subpoena, but obtains a stay of that order pending appeal.

Justice TONETTI, in an order entered January 25, 1977, denied Lerner's cross-motion to quash the subpoena and ordered Lerner to appear before the grand jury on January 28, 1977 with the subpoenaed books and records.

Lerner obtained a stay of this order from the Appellate Division, First Department, pending his appeal from this order.

The Appellate Division unanimously affirms the lower court order.

On May 10, 1977, the Appellate Division, First Department, unanimously affirmed the order of the lower court. *Matter of Hynes* v. *Lerner,* 57 A.D.2d 752 (1st Dept. 1977).

On July 7, 1977, the Court of Appeals, in *Matter of Heisler* v. *Hynes,* holds that a grand jury subpoena duces tecum does not authorize retention of subpoenaed materials by a grand jury for more than one day at a time.

On July 7, 1977, the Court of Appeals, in another case, held that, under New York law, a grand jury subpoena duces tecum does not authorize a grand jury to retain subpoenaed evidence for more than one day at a time. The Court also held that a prosecutor cannot examine subpoenaed evidence independently of the grand jury. *Matter of Heisler* v. *Hynes,* 42 N.Y.2d 250 (1977).

Within two weeks after the Court of Appeals' decision in *Matter of Heisler* v. *Hynes,* the New York State Legislature, as an emergency measure, enacts legislation specifically overruling that decision.

On July 19, 1977, after a message of necessity was issued by the Governor in order to expedite the legislative process, the New York State Legislature overruled *Matter of Heisler* v. *Hynes* by enacting Section 610.25 of the Criminal Procedure Law, which provides that a grand jury may possess subpoenaed records for a reasonable period of time, and amending Section 190.25(4) of the Criminal Procedure Law to provide that a prosecutor may independently examine materials subpoenaed on behalf of a grand jury.

The Court of Appeals unanimously affirms the lower court decision in this case.

On May 4, 1978, the Court of Appeals unanimously affirmed the lower court decisions in this case. It upheld the determinations of the lower courts that the grand jury had a legitimate need for the subpoenaed records to determine whether Lerner, or anyone else, had committed additional crimes in connection with the operation of the Park View Nursing Home. It also refused to require the daily return of the subpoenaed materials, as Lerner sought under the authority of *Matter of Heisler* v. *Hynes, supra.* Rather, it agreed with the Deputy Attorney General that the newly enacted statutes which overruled that decision were applicable to determine the mode of compliance with the subpoena. *Matter of Hynes* v. *Lerner,* 44 N.Y.2d 329 (1978).

Lerner challenges the constitutionality of Section 610.25 of the Criminal Procedure Law in federal court.

By order to show cause dated June 1, 1978, Lerner initiated a proceeding in the District Court of the Southern District of New York to declare Section 610.25 of the Criminal Procedure Law unconstitutional, under the authority of 28 U.S.C. §1343. Lerner also asked for a preliminary injunction to bar enforcement of the subpoena pending this proceeding. *Matter of Park View Nursing Home and Roland Lerner* v. *Hynes,* 78 Civ. 2489 (LWP). On June 6, 1978, Judge Pierce dismissed this action from the bench.

Lerner refuses to comply with the subpoena and another proceeding is initiated to have him held in contempt; Lerner cross-moves to have the subpoena modified.

From the date of the Court of Appeals' decision, May 4, 1978, there was no stay of the subpoena in effect. Nevertheless, Lerner refused to comply with the subpoena. A second motion was, therefore, brought by the Deputy Attorney General to have Lerner held in contempt. This motion was brought before Justice Tonetti of the Bronx County Supreme Court. *People* v. *Roland Lerner.* In response to this motion, Lerner cross-moved to have the court set limits upon the grand jury's right to possess the subpoenaed materials. In an order dated June 7, 1978, the court granted Lerner's application to the extent of limiting the time during which the grand jury could possess the subpoenaed records. Subject to these limitations, it again ordered Lerner to comply with the subpoena. It held in abeyance any decision upon the Deputy Attorney General's motion to have Lerner held in contempt pending compliance with this order.

Lerner fails to obtain a stay of this order and complies with the subpoena.

Lerner filed a notice of appeal from this order and sought a stay pending appeal from the Appellate Division, First Department. This application was denied. Thereafter, Lerner complied with the subpoena.

Statute Involved

Section 610.25 of the Criminal Procedure Law (McKinney's Consolidated Laws of New York, Book 11A), whose constitutionality is challenged by the appellant, provides:

> §610.25 Securing attendance of witness by subpoena; possession of physical evidence
>
> 1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.
>
> 2. The possession shall be for a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

POINT I

This appeal should be dismissed because it is moot.

Lerner has complied with the subpoena which he had sought to quash in the state court proceedings from which he seeks to appeal to this Court. Therefore, his appeal is moot and should be dismissed. *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The appellant's claims on appeal are frivolous. His appeal should be dismissed for want of a substantial federal question.

The appellant claims that the New York law permitting a grand jury to possess subpoenaed materials for a reasonable period of time for the purposes of its inquiry is unconstitutional absent a requirement that there be a showing of probable cause to believe that those materials contain evidence of a crime or are the fruits or instrumentalities of a crime. He claims that the Fourth Amendment is violated by such a law. This claim is without colorable merit.

This Court, as early as its decision in *Hale* v. *Henkel,* 201 U.S. 43 (1905), has recognized that a subpoena duces tecum authorizes the temporary dispossession of an owner's property for the uses of proof in a judicial proceeding and that probable cause, within the meaning of the Fourth Amendment, is not required. As stated by this Court:

> We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley,* 2 Cromp. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ.

Id. at 73. Justice McKenna, in his dissenting opinion (based upon his disagreement with the majority that even a limited application of the "reasonableness" requirement of the Fourth Amendment to a subpoena was appropriate) also recognized that a subpoena subjects a person's property to the uses of proof:

> There can be, at most, but a temporary use of the books, and this can be accommodated to the convenience of the parties. *It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require* (emphasis added).

Id. at 80.

This Court has clearly and consistently followed its decision in *Hale* v. *Henkel, supra,* by stating that the Fourth Amendment, "if applicable" at all to a subpoena duces tecum, is satisfied if the subpoena is reasonable, without requiring a showing of probable cause. See *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 195, 208-09 (1946); *United States* v. *Dionisio,* 410 U.S. 1, 11-12 (1973); *United States* v. *Miller,* 425 U.S. 435, 445-46 (1976).

Ironically, the appellant argues that Section 610.25 of the Criminal Procedure Law is unconstitutional because

it specifically directs a court to consider three factors in determining the reasonableness of the time, terms and conditions of the grand jury's possession of subpoenaed materials. This is precisely what Justice McKenna stated that courts should do in *Hale* v. *Henkel, supra*: "It is matter for the court and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require." *Id.* at 80.

The appellant argues that he has standing to challenge the constitutionality of this statute on its face because it subjects him to the criminal sanction of contempt should he misunderstand its terms, which he characterizes as "vague." This statute is not addressed to the appellant's conduct. It does not proscribe any act or ommission or subject anyone to any penalty, civil or criminal, for failing to abide by its terms. It merely advises courts concerning the factors to be considered in exercising their discretion to set limits upon the time, terms or conditions of subpoenas duces tecum. The appellant would be subjected to a contempt citation only if he were to disobey a a court order directing him to comply with such a subpoena. Presumably, there would be nothing vague about such an order.

In any event, this entire argument is academic. Following the Court of Appeals' decision affirming the validity of the subpoena duces tecum in issue here, the lower court, acting pursuant to Section 610.25, set limits upon the time, terms and conditions under which the grand jury could possess the subpoenaed records. Lerner sought a stay so

that he could appeal from that decision. His stay application was denied. Thereafter, Lerner complied with the subpoena. He can hardly claim now that he is subject to a criminal sanction should he not comply.

Conclusion

The appellant's appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed without argument.

Respectfully submitted,

CHARLES J. HYNES
Deputy Attorney General
State of New York
270 Broadway
New York, New York 10007
(212) 488-5281

T. JAMES BRYAN
Special Assistant Attorney General
Of Counsel

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(7430)

Supreme Court of the United States

October Term, 1978

No. 78-276

In the Matter of the Application of

FAR ROCKAWAY NURSING HOME
and LASZLO SZANTO, Partner,

Appellant,

For an Order Quashing Subpoenas Issued by

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Respondent.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

CHARLES J. HYNES
Deputy Attorney General
State of New York
270 Broadway
New York, New York 10007
(212) 488-5281

T. JAMES BRYAN
Special Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute:

Supreme Court of the United States

October Term, 1978

No. 78-276

In the Matter of the Application of

FAR ROCKAWAY NURSING HOME and LASZLO SZANTO, Partner,
Appellant,

For an Order Quashing Subpoenas Issued by

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,
Respondent.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE COURT OF APPEALS

Statement

Laszlo Szanto has filed a notice of appeal from an order of the New York State Court of Appeals, dated May 4, 1978, which unanimously affirmed an order of the Supreme Court, Queens County, entered December 16, 1977. *Matter of Far Rockaway Nursing Home et al.* v. *Hynes,* 44 N.Y.2d 383 (1978). This order had denied Szanto's motion to

quash a grand jury subpoena issued by the Deputy Attorney General on behalf of a Queens County Grand Jury. This brief is submitted in support of a motion to dismiss this appeal or, in the alternative, to affirm the decision of the Court of Appeals.

Introduction

The Original Subpoena

In October of 1976, a grand jury subpoena duces tecum was issued to Laszlo Szanto, a partner of the Far Rockaway Nursing Home, commanding him to produce the books and records of that home before a Queens County Grand Jury investigating nursing homes.

Mr. Szanto moved to quash this subpoena asserting that production of the home's books and records would violate his Fifth Amendment privilege against self-incrimination, that the subpoena was overbroad and that it had been improperly served. Justice BRENNAN of the Supreme Court of Queens County denied this motion in an order dated November 5, 1976. *Matter of Far Rockaway Nursing Home* v. *Hynes*.

On December 2, 1976, Mr. Szanto appeared outside the grand jury room in response to the subpoena with his attorney. However, he did not bring with him any of the subpoenaed books and records. Assistant Attorney General Frank Marine, after a discussion with Mr. Szanto's attorney, agreed to adjourn the subpoena duces tecum.

On March 18, 1977, Mr. Szanto was informed, through his attorney, to appear before the grand jury on March 31,

1977. A letter confirming this request was sent to both Mr. Szanto and his attorney. His attorney replied to this letter by writing to Assistant Attorney General Marine that Mr. Szanto was under no obligation to appear before the grand jury unless another subpoena were issued, because Mr. Szanto had satisfied his obligation to comply with the subpoena by appearing outside of the grand jury room on December 2, 1976.

Mr. Szanto did not appear before the grand jury as requested on March 31, 1977 and did not produce the subpoenaed materials.

A motion is made to have Szanto held in contempt.

Following Szanto's failure to appear before the grand jury, the Deputy Attorney General moved, by order to show cause, to have Mr. Szanto held in contempt of court. *Matter of Hynes* v. *Szanto*. In response to this motion, Justice AGRESTA of the Supreme Court of Queens County ordered Szanto to appear before the grand jury with the subpoenaed materials on June 7, 1977 or else be held in contempt.

Szanto appeals from the order commanding him to produce the subpoenaed records or be held in contempt.

Szanto filed a notice of appeal from the order directing him to produce the subpoenaed records on June 7, 1978 or be held in contempt. He then moved for a stay of this order in the Appellate Division, Second Department. On June 6, 1977, a conference was held in the chambers of Justice SHAPIRO of the Appellate Division, during which he suggested to Assistant Attorney General Marine that he issue

a new subpoena rather than pursue a contempt proceeding with respect to the original subpoena. Mr. Marine agreed to this suggestion.

A second subpoena is issued.

On August 1, 1977, a second grand jury subpoena duces tecum was issued to Szanto, commanding him to appear before the grand jury with the subpoenaed materials on August 25, 1977. Mr. Szanto moved to quash this subpoena on the ground that Section 610.25 of the Criminal Procedure Law, which had been recently enacted, is unconstitutional. *Matter of Far Rockaway Nursing Home* v. *Hynes.* This motion was denied by Justice BALBACH of the Supreme Court of Queens County on December 16, 1977. He ordered that the subpoenaed records be produced before the court on January 6, 1978 at which time a hearing would be held "to determine the length of time said records may reasonably be held and the conditions under which said records may be maintained pursuant to the criteria set down in Criminal Procedure Law, Section 610.25(2).

Szanto fails to produce most of the subpoenaed records as ordered by the court, claiming that they had been stolen during the proceedings.

Szanto did produce some records at the court, as required by Justice BALBACH's decision. However, most of the records were not produced. As stated by the Court of Appeals in the decision being appealed from:

> Denying appellants' motion to quash, Supreme Court, Queens County, held the statute constitutional, and ordered that the subpoenaed documents be placed in the custody of the Supreme Court, Queens County. However, most of the documents have not been delivered to the court due to an *alleged* burglary at Far Rockaway Nursing Home which *allegedly* occurred on June 6, 1977 (emphasis added).

Matter of Far Rockaway et al. v. *Hynes,* 44 N.Y.2d at 390.

The Court of Appeals affirms the lower court decision.

Upon a direct appeal to the Court of Appeals, based solely upon the appellant's challenge to the constitutionality of Section 610.25 of the Criminal Procedure Law, the Court unanimously affirmed the lower court's decision. *Matter of Far Rockaway Nursing Home et al.* v. *Hynes,* 44 N.Y.2d 383 (1978).

Szanto commences a federal action to challenge the subpoena.

After the Court of Appeals' decision, Szanto filed a complaint in the United States District Court for the Eastern District of New York seeking injunctive and declaratory relief from having to comply with the subpoena. *Far Rockaway Nursing Home and Laszlo Szanto* v. *Hynes,* 78 Civ. 1179. Szanto's motion for a preliminary injunction was denied by Judge NICKERSON on June 8, 1978. In a decision dated June 15, 1978, Judge NICKERSON stated that he would dismiss this complaint based upon the abstention doctrine unless the plaintiffs showed cause why it should not be dismissed within twenty days. This was not done and the complaint was subsequently dismissed.

A hearing is held to determine the time, terms and conditions of the grand jury's right to possess the subpoenaed materials.

After Szanto had failed in his attempt to have the federal court enjoin enforcement of the subpoena, a hearing was held before Justice BALBACH of the Supreme Court, Queens County, pursuant to Section 610.25 of the Criminal Procedure Law, to determine the time, terms and conditions of the grand jury's right to possess the subpoenaed materials. A decision was rendered by Justice BALBACH on June 20, 1978. He ordered that certain records be reproduced and returned to the nursing home immediately after the grand jury obtained possession of them. He also ordered that the remaining records could only be retained by the grand jury until October 4, 1978, after which they would have to be returned.

Szanto appeals from the order establishing the time, terms and conditions of the grand jury's right to possess the subpoenaed material and seeks a stay pending that appeal.

Szanto filed a notice of appeal from the order of Justice BALBACH setting the time, terms and conditions regarding the grand jury's right to possess the subpoenaed materials. He also sought a stay from the Appellate Division, Second Department, pending resolution of that appeal. This application was denied on July 5, 1975.

Szanto complies with the subpoena.

Following the denial of a stay, the subpoenaed books and records were produced before the grand jury on July 5, 1975.

Statute Involved

Section 610.25 of the Criminal Procedure Law (McKinney's Consolidated Laws of New York, Book 11A), whose constitutionality is challenged by the appellant, provides:

> §610.25 Securing attendance of witness by subpoena; possession of physical evidence
>
> 1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.
>
> 2. The possession shall be far a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

POINT I

This appeal should be dismissed because it is moot.

Szanto has complied with the subpoena which he had sought to quash in the state court proceedings from which he seeks to appeal to this Court. Therefore, his appeal is moot and should be dismissed. *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The appellant's claims on appeal are frivolous. His appeal should be dismissed for want of a substantial federal question.

The appellant claims that the New York law permitting a grand jury to possess subpoenaed materials for a reasonable period of time for the purposes of its inquiry is unconstitutional absent a requirement that there be a showing of probable cause to believe that those materials contain evidence of a crime or are the fruits or instrumentalities of a crime. He claims that the Fourth Amendment is violated by such a law. This claim is without colorable merit.

This Court, as early as its decision in *Hale* v. *Henkel,* 201 U.S. 43 (1905), has recognized that a subpoena duces tecum authorizes the temporary dispossession of an owner's property for the uses of proof in a judicial proceeding and that probable cause, within the meaning of the Fourth Amendment, is not required. As stated by this Court:

> We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley,* 2 Cromp. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ.

Id. at 73. Justice McKenna, in his dissenting opinion (based upon his disagreement with the majority that even a limited application of the "reasonableness" requirement of the Fourth Amendment to a subpoena was appropriate) also recognized that a subpoena subjects a person's property to the uses of proof:

> There can be, at most, but a temporary use of the books, and this can be accommodated to the convenience of the parties. *It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require* (emphasis added).

Id. at 80.

This Court has clearly and consistently followed its decision in *Hale* v. *Henkel, supra,* by stating that the Fourth Amendment, "if applicable" at all to a subpoena duces tecum, is satisfied if the subpoena is reasonable, without requiring a showing of probable cause. See *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 195, 208-09 (1946); *United States* v. *Dionisio,* 410 U.S. 1, 11-12 (1973); *United States* v. *Miller,* 425 U.S. 435, 445-46 (1976).

Ironically, the appellant argues that Section 610.25 of the Criminal Procedure Law is unconstitutional because

it specifically directs a court to consider three factors in determining the reasonableness of the time, terms and conditions of the grand jury's possession of subpoenaed materials. This is precisely what Justice McKenna stated that courts should do in *Hale* v. *Henkel, supra*: "It is matter for the court and we cannot assume that the court will fail of consideration for the interest of parties, or subject them to more inconvenience than the demands of justice may require." *Id.* at 80.

The appellant argues that he has standing to challenge the constitutionality of this statute on its face because it subjects him to the criminal sanction of contempt should he misunderstand its terms, which he characterizes as "vague." This statute is not addressed to the appellant's conduct. It does not proscribe any act or ommission or subject anyone to any penalty, civil or criminal, for failing to abide by its terms. It merely advises courts concerning the factors to be considered in exercising their discretion to set limits upon the time, terms or conditions of subpoenas duces tecum. The appellant would be subjected to a contempt citation only if he were to disobey a a court order directing him to comply with such a subpoena. Presumably, there would be nothing vague about such an order.

In any event, this entire argument is academic. Following the Court of Appeals' decision affirming the validity of the subpoena duces tecum in issue here, the lower court, acting pursuant to Section 610.25, set limits upon the time, terms and conditions under which the grand jury could possess the subpoenaed records. Szanto sought a stay so

that he could appeal from that decision. His stay application was denied. Thereafter Szanto complied with the subpoena. He can hardly claim now that he is subject to a criminal sanction should he not comply.

Conclusion

The appellant's appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed without argument.

Respectfully submitted,

Charles J. Hynes
Deputy Attorney General
State of New York
270 Broadway
New York, New York 10007
(212) 488-5281

T. James Bryan
Special Assistant Attorney General
Of Counsel

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(7434)